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**WASHINGTON REPORTS**

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**CASES DETERMINED**

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**OF**

**WASHINGTON**

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**JUNE 18, 1917—AUGUST 17, 1917**

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**JUDGES**  
**OF THE**  
**SUPREME COURT OF WASHINGTON**

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## ERRATA

Page 528, 1st syllabus, line 7 from top, for of inequality read  
or inequality





**CASES**  
DETERMINED IN THE  
**SUPREME COURT**  
OF  
**WASHINGTON**

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[No. 13852. Department One. June 15, 1917.]

**DuBois LUMBER COMPANY, *Respondent*, v. L. T. DIETDERICH  
*et al.*, *Defendants*, CLAUDE HARRIS *et al.*, *Respondents*,  
BEN J. BELL *et al.*, *Appellants*.<sup>1</sup>**

LOGS AND LOGGING—LIENS—WAIVER—SALE AND APPROPRIATION OF PURCHASE MONEY. Laborer's liens on logs are not waived by an agreement allowing a purchaser to advance freight and booming expenses and saw the logs prior to execution sale, where no one was prejudiced, in view of Rem. Code, § 1177, making it the duty of the purchaser of liened logs to apply the purchase money to the satisfaction of *bona fide* liens; and this applies to liens for which no suit to foreclose had been instituted.

GARNISHMENT—PROPERTY SUBJECT. Where logs had not come into the possession of a garnishee at the time the writ was served and answered, he would not be liable therefor under the writ.

LOGS AND LOGGING — LABORERS' LIENS — PRIORITY OVER GARNISHMENT. Where laborers had prior liens upon saw logs, which were sold and sawed up and produced a fund which it was the duty of the purchaser to apply in satisfaction of the liens, a garnishment of the purchaser is ineffectual, even though the logs were in the purchaser's possession at the time the writ was served and answered; Rem. Code, § 1206, giving priority to the laborers' liens.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered April 17, 1916, upon findings in favor of certain defendants, in an action of interpleader, tried to the court. Affirmed.

<sup>1</sup>Reported in 165 Pac. 884.

*H. W. Arnold* and *R. C. Sugg*, for appellants.

*McMaster, Hall & Drowley*, for respondents.

MAIN, J.—The plaintiff in this case, having in its possession the sum of \$1,176.85, to which it made no claim, and there being a number of other parties asserting conflicting rights to the fund, brought this action in interpleader for the purpose of having the conflicting claims to the fund determined. All parties interested were made defendants in the action. From the judgment entered, two of the defendants appeal.

The facts out of which the litigation grew are substantially these: Henry Haselhorst, one of the appellants, on the 9th day of February, 1915, being then the owner of about 160 acres of timber land situated in Clarke county near the town of Yacolt, sold the standing timber thereon to L. T. Dietderich and John Studer, copartners doing business under the name of Dietderich & Studer. The purchase price was \$1.50 per M, according to the scale of the Northern Pacific Railway Company, over which road the logs were to be transported from Yacolt to Vancouver. Dietderich & Studer then sold the logs to the respondent DuBois Lumber Company, for \$6.50 per M, mill scale, delivered at the company's mill in Vancouver. According to the terms of the contract between Dietderich & Studer and Haselhorst, payment was to be made to the latter on the 10th day of each month for all logs cut during the previous month. Dietderich & Studer, after making the contract to deliver the logs to the DuBois Lumber Company, proceeded with their logging operations. The first few payments due Haselhorst were made to him direct by Dietderich & Studer. About June, 1915, or a few months after operations had been in progress under the contract, Haselhorst became dissatisfied with the manner in which Dietderich & Studer were making the stumpage payments, and went to the DuBois Lumber Company and asked it to hold out for him the money due him for stumpage. He was told

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by that company that it would hold out the stumpage, but that it would not guarantee it. Dietderich & Studer subsequently assented to the arrangement made by Haselhorst with the lumber company relative to the payments. All payments due Haselhorst for stumpage under his contract, up to October 1, 1915, were made either by Dietderich & Studer or by the DuBois Lumber Company.

On or about October 26, 1915, Dietderich & Studer ceased logging operations. They were then indebted in a considerable sum for wages due their employees. On October 27, 1915, the labor claimants filed a claim of lien upon the logs then in Clarke county, to secure payment of the work and labor performed by each of them, and immediately after commenced an action to foreclose the same. In this action, judgment was entered in favor of the labor claimants for the amount due them, aggregating \$1,660.87, and attorneys' fees in the sum of \$88.15. Either before or immediately after this judgment was entered, an arrangement was made with the DuBois Lumber Company to pay the freight on the logs then in the possession of the railroad company, as well as the expense of conveying them through the booms to the mill, and the lumber company agreed to be responsible for the logs or their value at the time they were sold under execution. Upon this judgment, execution was issued, and the liened logs were sold on November 16, 1915, by the sheriff to the DuBois Lumber Company for \$1,525.90. The proceeds of this sale were applied upon the labor claimants' judgment, leaving a balance due thereon of approximately \$245.85.

On the 27th day of October, the day on which the labor liens were filed, the appellant Ben J. Bell, then having a judgment against Dietderich & Studer, caused a writ of garnishment to be issued and served upon the DuBois Lumber Company. The lumber company answered the writ, admitting the possession of \$1,176.85, and alleging that it possessed no other money or property belonging to Dietderich & Studer. This answer Bell controverted. The present ac-

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that the purchase money is appropriated to the satisfaction of the liens, and construing this statute in *Livingstone v. Lovgren*, 27 Wash. 102, 67 Pac. 599, it was said:

“Under § 5945 [Rem. Code, § 1177], *supra*, it will be seen that if the purchaser, purchasing logs on which there is a lien within the thirty days in which the claimant has to file his lien fails to see that the purchase money is appropriated to the satisfaction of the liens, he is liable. Under this section it was lawful for the appellant to purchase the logs for their full value, and apply the proceeds to the lien claims.”

In the present case, the lien claimants had valid liens upon the logs which produced the fund of \$1,525.90, as well as the \$206. The trial court did not err in sustaining the labor claimants' superior rights to these two funds.

There is some controversy over the terms of the arrangement entered into by which the lumber company agreed to hold and pay to Haselhorst each month the money which was due Dietderich & Studer upon the logs sawed during the previous month. The appellants claim that this arrangement obligated the lumber company to pay all such sums to Haselhorst. The respondent lumber company claims that it only agreed to hold out and pay to Haselhorst all stumpage due or to become due under his agreement with Dietderich & Studer, on or about the 10th day of each month, for all “J. S.” logs delivered and received during the previous month, but that it did not assume or guarantee such payments. The trial court found that the arrangement was as contended for by the respondent, and from our examination of the record, we are convinced that the testimony amply sustains this finding.

Referring more particularly to the appellant Bell, he would have no claim under his garnishment to the \$206 item, because, at the time the writ was answered, the logs which produced this item had not come into the possession of the lumber company. *Frieze v. Powell*, 79 Wash. 483, 140 Pac. 690. He would have no right to the \$1,525.90 item, even

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though the logs which produced this item were in possession of the lumber company at the time the writ was served and the answer thereto made, because, under Rem. Code, § 1206, the labor claimants' rights under their lien claims were superior to Bell's rights under the writ of garnishment.

The judgment will be affirmed.

ELLIS, C. J., MORRIS, CHADWICK, and WEBSTER, JJ., concur.

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[No. 13773. Department One. June 18, 1917.]

A. A. CRANE, *Appellant*, v. WASHINGTON WATER POWER  
COMPANY, *Respondent*.<sup>1</sup>

ATTORNEY AND CLIENT—CONTRACT OF EMPLOYMENT—CONSTRUCTION—PERFORMANCE. Under an attorney's contract to secure a permit from the United States to flood certain lands under the act of February 15, 1901, 31 Stat. L. 790, which provided that such permission should not vest any right or interest in public land and could be revoked by the Secretary of the Interior at his discretion, for which service the attorney was to receive \$25,000, with a further provision for additional compensation in the sum of \$25,000 if the attorney should within three years procure and cause to be vested the "perpetual right, power and authority to flood the land," the additional compensation is not earned by procuring a revocable permit under the act of February 15, 1901, but the last clause contemplates a greater right than that obtainable under that act.

SAME. In such a case, the attorney was not prevented from performing the contract as to the perpetual right by the fact that, after the permit obtained by him was revoked, other attorneys were employed to get the permit restored.

APPEAL—REVIEW—SCOPE—RECORD. Where a demurrer to a complaint was sustained and the defendant refused to plead further and appealed, the appellate court cannot permit the filing of, and consider, pleadings in other cases or permit an amendment to the complaint.

Appeal from a judgment of the superior court for Spokane county, Blake J., entered August 21, 1916, upon sustaining

<sup>1</sup>Reported in 165 Pac. 892.

a demurrer to the complaint, dismissing an action on contract. Affirmed.

*Robertson & Miller, F. D. Crane, and Isham N. Smith, for appellant.*

*Post, Russell, Carey & Higgins, for respondent.*

MAIN, J.—The purpose of this action was to recover an attorney's fee in the sum of \$25,000, alleged to be due upon a written contract. To the fourth amended complaint, a demurrer was interposed and sustained. The plaintiff refused to plead further, and elected to stand upon this amended complaint. Thereupon judgment was entered dismissing the action, from which the appeal is prosecuted.

The complaint is too voluminous to be here set out in full, but the controlling facts therein stated may be summarized as follows:

The appellant is an attorney at law, duly licensed under the laws of the state of Idaho, and residing in that state. The respondent is a corporation, organized and existing under and by virtue of the laws of the state of Washington, and is a public service corporation, owning and operating certain electric light and power plants in the city of Spokane, and at Post Falls, Idaho. Immediately prior to the year 1908, the respondent had constructed, or had in the course of construction, a dam at Post Falls, Idaho, by which to impound the waters of the Spokane river and Lake Coeur d'Alene. Much of the land around the shore line of the lake and along the tributaries adjacent thereto was low, which the impounding of the water would cause to be inundated. Before the respondent would have a right to overflow a considerable portion of the land, it was necessary to secure a permit from the Secretary of the Interior authorizing the overflow of the lands belonging to the Federal government. For the purpose of securing this permit from the Federal government, a contract between the parties was entered into, as follows:



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"It is hereby agreed by and between the Washington Water Power Company with A. A. Crane, that if the said Crane shall, within six months from the date hereof, to the satisfaction and approval of counsel and attorneys for said company at Spokane, Washington, procure and cause to be vested in said company, license, power and authority from the United States through its Secretary of the Interior, to back and hold water upon and flood and overflow with water so much of the Coeur d'Alene Indian Reservation in the state of Idaho, and also any lands in any National or Government park within the exterior boundaries of said reservation as said boundaries existed January 1, 1908, as are below an elevation of two thousand one hundred and twenty-eight feet above mean sea level, including all mounds, raises, hills and elevations within the exterior boundaries of said elevation of twenty-one hundred and twenty-eight feet, which said right to flood and overflow the said lands and to have and maintain as a reservoir, shall conform to and be granted under that certain act entitled, 'An Act Relating to Rights of Way Through Certain Parks, Reservations and Other Public Lands,' approved February 15, 1901, and contained in 31 Statutes at Large at page 790; and any other act or law of the United States which may be applicable; then, and in those events, said the Washington Water Power Company shall and will pay to said Crane the sum of twenty-five thousand dollars, or so much thereof as remains after paying any and all claims, demands and charges which said company may see fit to pay and which may have to be paid to secure said rights from the United States or Indians or any Indian, or any other person on said reservation having or claiming to have any valid or legal interest in said lands, or any part thereof; but no amount shall be paid on this contract as herein provided, by the Washington Water Power Company other than such as may be necessary to be paid to the United States and fees legally collectible by the officers of the United States, except on and with approval of said Crane.

"Said sum of \$25,000, or any part thereof, shall not be due or payable, except upon the written certificate of said Spokane attorneys of said company, which certificate shall be given and payment made to said Crane, within sixty days after full compliance with this contract by said Crane; pro-

vided said Crane shall fully comply with all the terms hereof within three years from the date of this contract.

"The said Crane agrees to use his best efforts to secure the aforesaid rights as to, upon and over the whole of the lands hereinbefore mentioned and to transfer, or cause the same to be transferred to said company, its successors or assigns, as soon as secured.

"If said Crane shall not secure said rights and the whole thereof, as and when herein provided, said The Washington Water Power Company shall not be liable to said Crane, or any other person, for any sum or amount whatever.

"It is further agreed that if the said Crane shall, within three years from the date hereof, to the satisfaction and approval of counsel and attorneys of said company at Spokane, Washington, procure and cause to be vested in said company the perpetual right, power and authority to back and hold water upon and flood and overflow and to maintain reservoir upon and over the land hereinbefore described, then and in that event the said The Washington Water Power Company shall pay the said Crane the further sum of twenty-five thousand dollars, payable on the certificate of counsel and attorneys of the Washington Water Power Company as hereinbefore provided with reference to the other payment hereinbefore agreed to be made upon the conditions and provisions hereinbefore set forth.

"Dated at Spokane, Washington, this 22nd day of December, 1908."

After this contract was entered into, the appellant proceeded to the city of Washington, D. C., and there, as attorney for the respondent, made application to the department of the interior, and through the office of Indian affairs, for a permit to enable the respondent to overflow the lands mentioned in the contract, under the provisions of the Act of Congress of February 15, 1901, as provided in the contract. On February 2, 1909, the Secretary of the Interior, after a hearing and proceedings had through the office of Indian affairs, issued a permit authorizing the respondent to overflow the lands mentioned, but requiring, as a consideration therefor, that certain Indians, who were occupants of the lands, be paid for damages sustained by reason of the over-

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flow waters at the rate of \$1.25 per acre. More than \$7,500 was paid to the United States for the benefit of the Indians, the same being taken from the first \$25,000 mentioned in the contract. After the right to overflow was granted, the Department of the Interior, in issuing patents by the United States to entrymen under the homestead laws, inserted a clause therein that such lands were subject to the rights of the Washington Water Power Company under the permit theretofore issued. It is alleged that, in securing the grant or permit above mentioned from the United States, through the Secretary of the Interior, the appellant has caused to be vested in the respondent "perpetual right, power and authority" to flood and overflow the lands covered by the permit. Sometime after the permit had been issued, the Department of the Interior required the Washington Water Power Company to show cause why its grant or permit should not be revoked. Thereafter, a hearing was had by the Department of the Interior, and on July 29, 1910, an order was entered revoking the permit. On the 22d day of April, 1912, the Secretary of the Interior entered an order setting aside the previous revocation, holding that the same was arbitrary and unjustifiable and there did not appear to be any sufficient reason for the revocation. While the matter was proceeding in the Department of the Interior, on an application to set aside the previous revocation of the permit, the respondent substituted other attorneys for the appellant in that proceeding.

The first question is whether the appellant had done all that he was required to do under the written contract in order to recover the second \$25,000 mentioned therein. There is no controversy here over the first \$25,000, as that has already been paid. A careful reading of the contract discloses that, by the terms thereof, the appellant was to do two things, the first being to procure and cause to be vested in the respondent, "license, power and authority" from the United States, through the Secretary of the Interior, to flood

or overflow certain lands, which permit was to "conform to and be granted under that certain act entitled, 'An Act Relating to Rights of Way Through Certain Parks, Reservations and Other Public Lands,' approved February 15, 1901, and contained in 31 Statutes at Large at page 790; and any other act or law of the United States which may be applicable." The other thing which the appellant was authorized to do under the contract is contained in the last paragraph thereof, and was that, if within three years he should procure and cause to be vested in the respondent "the perpetual right, power and authority to back and hold water upon and flood and overflow" the land before described, he should be paid the sum of \$25,000.

It is not claimed that the appellant caused any permit to be issued other than that above mentioned, which was issued under the act of February 15, 1901, but it is claimed that this permit vested in the respondent the perpetual right, power and authority to flood the lands mentioned. By the act of February 15, 1901, it is provided that the Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States for electrical plants, poles, and lines for the generation and distribution of electrical power, etc. This act contains the proviso "that any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park." It seems plain that a permit to flood lands, issued under this act of Congress, would not, and could not, confer a perpetual right to flood or overflow land. The proviso quoted gives the Secretary of the Interior authority to revoke in his discretion, and provides that any permit issued thereunder shall not confer any right, or easement, or interest in, to, or over any public land. A right subject to these limitations could not

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well be considered perpetual. It is argued, however, that the word "perpetual" must be given a meaning which the parties to the contract intended, having regard to the subject-matter thereof and the surrounding facts and circumstances, and this proposition cannot well be disputed.

Looking again to the contract, it first provided for license, power and authority from the United States to flood the land, which should be issued under the act of February 15, 1901, and fixed the compensation for that service. It will be noticed that, in this part of the contract, the word "perpetual" is not mentioned. In the second part of the contract, which is found in the last paragraph, an additional compensation in the sum of \$25,000 is to be paid, provided the appellant, within three years from the date of the making of the contract, should procure and cause to be vested in the respondent the "perpetual right, power and authority" to flood the land. This would indicate that, in order to earn the second \$25,000 mentioned, the appellant was to secure a greater right than could be obtained under the act of February 15, 1901. It was obviously not the intention of the parties, at the time the contract was executed, that the \$25,000 mentioned in the last paragraph should become due when a permit should be issued by the department of the interior under the act of February 15, 1901.

Some mention is made in the briefs of § 2339, United States Compiled Statutes, but it was held in *United States v. Utah Power & Light Co.*, 209 Fed. 554, and *Utah Power & Light Co. v. United States*, 230 Fed. 328, by the circuit court of appeals for the eighth circuit, that that section of the revised statutes is not applicable where the right to burden public lands involves the generation, manufacture, or distribution of electric power. The appellant, not having caused the perpetual right to flood the land to be vested in the respondent, as mentioned in the last paragraph of the contract, is not entitled to the \$25,000 which was to be paid him if he secured that right, unless he has been prevented from per-

forming that part of the contract by the respondent. It is alleged, as above stated, that, after the permit was issued and revoked, and while the cause was pending in the Department of the Interior seeking restoration of the permit and the setting aside of the revocation, other attorneys were substituted for the appellant in that proceeding, but this would not prevent the appellant from proceeding under the last paragraph of the contract, which involved the perpetual right.

The permit, as finally sustained by the Department of the Interior, was under the act of February 15, 1901, and, as already stated, in our opinion, did not vest in the respondent a perpetual right. Had the appellant been permitted to handle the litigation which resulted in sustaining the permit and setting aside the previous revocation, he would have been in no different position than he now is. Not having secured the perpetual right as provided for in the concluding paragraph in the contract, and not having been prevented from performing that part of the contract by any act of the respondent, the service for which the \$25,000 there mentioned was to be compensation has not been rendered and no recovery can be had therefor.

In the reply brief two cases are referred to which had been instituted in the district court of the United States for the district of Idaho, central division, in each of which the Washington Water Power Company, the respondent here, was defendant, and request is made for permission to file and have the court consider certified copies of the pleadings in those cases, and in the event that this request is denied, that the appellant be permitted to amend his fourth amended complaint. To sustain either of these requests would be to adopt a procedure unknown to the laws of this state. When the trial court sustained the demurrer to the fourth amended complaint, the appellant refused to plead further and elected to stand thereon, and brought the matter to this court by appeal for the purpose of reviewing the ruling of the trial court.

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Whether the judgment of the trial court is right must be determined from the facts alleged in the complaint, and these can neither be enlarged nor modified by any facts that may appear in the pleadings in the two cases mentioned. The request to file will be denied, and also the request to permit in this court an amendment to the fourth amended complaint. While it is not material, it may be said that the apparent purpose of the request to file the papers or to amend was to get before this court the fact that, in the Federal court, where those actions are pending, the respondent had taken a different position upon the law from that it here takes, but if the respondent here (defendant in those cases) there took an unsound position upon the law, that would not be a good reason to deny it the right here to urge a correct view of the law.

The judgment will be affirmed.

ELLIS, C. J., CHADWICK, MORRIS, and WEBSTER, JJ.,  
concur.

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[No. 13922. Department One. June 18, 1917.]

ADRIAN MAGALLON, *Plaintiff*, v. GEORGE ADAM SCHREINER  
*et al.*, *Defendants*, HENRY T. HILL, *Appellant*,  
JAMES D. STEWART, *Respondent*.<sup>1</sup>

MORTGAGES — ASSUMPTION OF MORTGAGE — CONTRACT — EVIDENCE.  
Where a contract for the purchase of land contained no provision for the assumption of a mortgage, the purchaser cannot be made liable on a deficiency judgment from the fact that a deed in blank had been executed containing an assumption of the mortgage, where the deed was not delivered or its contents made known to the purchaser.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered April 21, 1916, decreeing a deficiency judgment as against a defendant assignee of the mortgagor, in an action to foreclose a mortgage. Reversed.

*Rader & Barker*, for appellant.

<sup>1</sup>Reported in 165 Pac. 1048.

MAIN, J.—The purpose of this action was to foreclose a real estate mortgage and for a deficiency judgment. The trial resulted in a judgment of foreclosure which provided that, in the event the property covered by the mortgage did not sell for enough to satisfy the indebtedness secured thereby, a deficiency judgment be taken. From this judgment, the defendant Henry T. Hill, against whom was rendered a contingent deficiency judgment, appeals.

The facts are these: On the 28th day of December, 1909, George A. Schreiner and wife, being then the owners of certain real estate in Walla Walla county, mortgaged the same to Adrian Magallon, the plaintiff in this action, for the purpose of securing an indebtedness in the sum of \$3,500. On the 23d day of February, 1912, Schreiner and wife sold and conveyed the property covered by the mortgage to John S. Wickersham, the deed providing that the purchaser assumed and agreed to pay the mortgage. On the 11th day of April, 1912, Wickersham sold and conveyed the property to James D. Stewart. The deed making this conveyance also provided that the purchaser assumed and agreed to pay the mortgage. On the 12th day of November, 1912, Stewart, being then the owner of the property covered by the mortgage, contracted to sell the same to Henry T. Hill, and the latter, by the same contract, agreed to convey to Stewart certain property then owned by Hill in the state of Oregon. This contract was signed by Stewart and Hill, but contained no provision that Hill should assume or pay the mortgage upon the property which was to be conveyed to him by Stewart. On the 26th day of November, 1912, Stewart executed a deed of conveyance of the property covered by the mortgage. This deed was a conveyance to a grantee in blank, as no person was named therein to whom the title to the property was conveyed. This deed contains a provision that the second party (blank grantee) agreed to assume and pay the mortgage. There is no evidence that this deed was ever delivered to Hill, that he knew its contents, or that he ever asserted any



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ownership or dominion over the property. The decree of foreclosure provides for a deficiency judgment against Schreiner and wife, Wickersham and Stewart, with the further provision that Stewart, for any sum that he may be compelled to pay in satisfaction of the deficiency judgment against him, shall have a judgment over against Hill. It is from this provision of the judgment that Hill appeals. By this appeal, no other provision of the judgment is affected.

The trial court did not make formal findings of fact and conclusions of law, but it is recited in the judgment that, on or about the 26th day of November, 1912, Hill entered into an agreement and understanding with Stewart whereby the former was obligated to reimburse the latter for any payments which he (Stewart) might be obligated to make in satisfaction of any deficiency judgment against him. The record contains no evidence to support this finding. As already stated, the contract of sale or exchange between Stewart and Hill did not provide that the latter should assume or pay the mortgage. There is no evidence that the deed executed in blank on the 26th day of November, 1912, was ever delivered to Hill, or that he knew of its contents. Neither is there any evidence that Hill ever asserted or claimed ownership or dominion over the property described in the deed executed by Stewart to a blank grantee. Under these facts, it cannot be held that Hill agreed to assume and pay the mortgage. It was error, therefore, for the trial court to provide in the judgment that Stewart, in the event that he should be called upon to pay a deficiency judgment, should have a judgment over against Hill. The effect of the delivery of a deed in blank, where a person acting thereunder takes possession of, or assumes dominion over, the property described therein, is not before us in this action, and no opinion is expressed thereon.

The judgment, to the extent appealed from, will be reversed, and the cause remanded with direction to the superior

court to eliminate therefrom that provision which provides for a judgment over in favor of Stewart and against Hill.

ELLIS, C. J., CHADWICK, MORRIS, and WEBSTER, JJ., concur.

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[No. 13923. Department One. June 18, 1917.]

DEL CARY SMITH, *Administrator et al.*, *Appellants*, v. ANNA BARBER *et al.*, *Respondents*.<sup>1</sup>

SPECIFIC PERFORMANCE—PLAINTIFF'S PERFORMANCE—DEFAULT. Specific performance of a contract to convey land cannot be enforced where the contract called for the payment of \$143.50 and interest to the state "on the contract" and the sum was due to the state and had not been paid; and it is immaterial whether the defendant was entitled to rescind, since plaintiff must recover on the strength of his own title, and cannot do so while in default.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered October 19, 1915, upon findings in favor of the defendants, in an action for specific performance, tried to the court. Affirmed.

*Tolman & King*, for appellants.

*E. J. Farley*, for respondents.

MORRIS, J.—Appeal from a decree denying specific performance of a contract for the purchase of real estate. Prior to October, 1910, Owen H. Barber and Anna Barber were husband and wife. On the 3d day of August, 1907, they entered into a contract with the state of Washington for the purchase of certain real estate in the city of Spokane. The purchase price was fixed at \$300, of which \$30 was paid at the time of the execution of the contract, and the remainder was to be paid in nine annual installments on March 1, with interest on all sums then unpaid. By a decree of divorce in October, 1910, this property was set aside to

<sup>1</sup>Reported in 165 Pac. 873.

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Anna Barber as her separate property. In November, 1910, Owen H. Barber and Anna Barber entered into the contract which forms the basis of this action, and which is as follows, so far as material:

"It is hereby agreed, by and between Anna Barber, divorced wife of O. H. Barber, the party of the first part, and O. H. Barber, the party of the second part, that the said party of the first part will sell to the said party of the second part, his heirs and assigns; and the said party of the second part will purchase of said party of the first part, her heirs, executors, or administrators, the following described lot, tract or parcel of land situated in Spokane county, state of Washington, to-wit:

"An undivided half interest in lot 12, block 31, subdivision of school section 16, township 25, range 43, E. W. M., with the appurtenances thereto belonging, on the following terms:

"(1) The purchase price of said land to be \$1,000 of which the sum of \$1,000 has this day been paid as earnest money, the receipt of which is hereby acknowledged by the said party of the first part, and the further sum of \$143.50, to be paid the state of Washington, on a contract now outstanding with interest thereon from date until paid at the rate of six per cent per annum.

"(2) Said land to be conveyed by good and sufficient deed to the said party of the second part, when said purchase price shall have been fully paid.

"(3) Time is the essence of this contract.

"(4) If the said party of the second part fails to pay the whole sum of said purchase price and interest, within the time above specified, then the said party of the first part may if she so elect rescind this contract, and in that case all payments made by said party of the second part shall be forfeited."

Owen H. Barber died the following April, and the appellants are his administrator and heirs. On July 18, 1913, nothing having been paid upon the contract by Owen H. Barber, Anna Barber served upon his administrator a notice of forfeiture, appellants being given until the 29th day of July to comply with the contract and make the payments therein designated; and on December 24, 1913, the contract

still being uncomplied with, a second notice of forfeiture was served in which the contract was declared rescinded and forfeited. On December 7, 1914, the administrator tendered to respondent the sum of \$180 as payment of the amount due under the contract, which tender was refused, and the same, with interest, was repeated at the trial and the amount deposited with the clerk of the court. The lower court found that plaintiffs had failed to show any right to recover and that the action should be dismissed.

Appellants' first contention is that, under his contract, Owen H. Barber was privileged to pay the sum of \$143.50 to the state at any time within the term of the contract, and that a payment as late as March 1, 1916, the day of the final payment, would be a compliance with his contract with Anna Barber. The contract calls for a payment of \$143.50 to be paid the state of Washington by Owen H. Barber "on the contract now outstanding, with interest thereon from date until paid at the rate of six per cent." The phrase "on the contract" means according to the terms of that contract. There was due the state at that time, according to the terms of the contract, a sum in excess of \$143.50. There was neither allegation nor proof that, prior to instituting this action, Owen H. Barber or his representatives had made a payment of any sum to the state, or had attempted in any way to comply with the terms of the contract. The second amended complaint, upon which the action was tried, alleges that, subsequent to the death of Owen H. Barber in April, 1911, Anna Barber paid the state the amount due upon the contract of purchase with the state; that appellants have demanded of her a statement of the amount so paid, which demand has been refused, and that they were informed by Anna Barber that she would reject and refuse to accept any tender that might be made. The proof goes no further.

Certainly this is not sufficient to support an action for specific performance. Appellants say little in their brief concerning their right of recovery, but say much concerning

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respondent's right to a forfeiture. Whether or not respondent was entitled to rescind and forfeit the contract is immaterial. Appellants must recover, if at all, upon the strength of their own case and not upon the weakness of the defense. Their right to a specific performance of the contract between Owen H. Barber and Anna Barber depends upon strict compliance with that contract on the part of Owen H. Barber. This they failed to prove. Nor did they offer any justification or waiver of their failure in this respect. A party cannot enforce specific performance of a contract while in default of its terms. *Kiefer v. Carter Contracting & Hauling Co.*, 59 Wash. 108, 109 Pac. 332. Under the terms of the contract between the Barbers, it contemplated a future, not a present sale, conferring neither right nor title upon the vendee until by compliance with its terms he had himself performed. The term of the contract necessary to be complied with in order for Owen H. Barber to have the right of performance was the payment of \$143.50 to the state of Washington. No proof of such compliance having been offered, no conveyance under the contract could be enforced. *Younkman v. Hillman*, 53 Wash. 661, 102 Pac. 773; *Tieton Hotel Co. v. Manheim*, 75 Wash. 641, 135 Pac. 658. The record is susceptible to no other judgment than that appealed from. It is affirmed.

ELLIS, C. J., CHADWICK, MAIN, and WEBSTER, JJ., concur.

[No. 13924. Department One. June 18, 1917.]

H. S. GRIFFITH *et al.*, *Appellants*, v. CHARLES GIFFORD *et al.*,  
*Respondents*.<sup>1</sup>

**VENDOR AND PURCHASER—RESCISSION BY VENDEE—MISREPRESENTATIONS.** Falsely representing that there was no snapdragon on a farm is ground for rescission, where it appears that it is a noxious weed practically impossible to eradicate and that there were several large patches of it, materially reducing the value of the farm.

**SAME—MISREPRESENTATIONS — EVIDENCE — SUFFICIENCY.** The evidence sufficiently establishes false representations by the vendor that there was no snapdragon on a farm, where it appears that he knew the weed, shocked oats over the patches of snapdragon on the farm, and stated that there was none to his knowledge, and the vendees testified that they made inquiry of the vendor, who represented there was none on the place.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered September 16, 1916, in favor of the defendants, in an action for rescission, tried to the court. Reversed.

*Zent & Powell*, for appellants.

**MAIN, J.**—This action was brought to rescind a contract for the purchase of real estate on the ground of fraud. The trial in the superior court resulted in a judgment denying rescission, from which the plaintiffs appeal.

The facts out of which the litigation arose are these: For some time prior to the month of March, 1916, the appellants had owned and occupied a farm in Grant county, which they had sold a short time prior to entering into the transaction out of which this controversy arose. After selling the farm in Grant county, Mr. Griffith, in looking about for the purchase of another place, came to Latah, in Spokane county. This was in what is referred to in the evidence as the "Palouse country." After coming to Latah, he met friends there who

<sup>1</sup>Reported in 165 Pac. 874.

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warned him against purchasing a farm upon which there was any "wild snapdragon." After being so warned, he fully made up his mind not to purchase a farm if there was growing thereon any of that weed.

A few days after coming to Latah, Griffith was taken by one J. S. Farrelly, who lived in or near that town, six miles into the country to look at a place then owned by the respondents. Two or three days after having made this trip, Griffith met the respondent Charles Gifford in Latah and talked with him relative to the farm. During this conversation, Farrelly asked Gifford if there was any snapdragon on the farm, and received the reply, "Not to my knowledge." Shortly after this conversation, or within a few days, Gifford took Mr. and Mrs. Griffith out to see the farm, and, as the Griffiths both testified, while they were driving along the highway adjacent thereto, they inquired whether there was any snapdragon on the place, and received the positive answer that there was not. Gifford denies this conversation. Upon this trip, the parties did not go over the place, but a few days later, Gifford and Griffith again visited the farm and walked over it. The place had been owned by the respondents for seven years prior to this time, and had been occupied by them during all of that time, with the exception of one year. The negotiations referred to resulted in a contract on March 30, 1916, by which the respondents sold to the appellants the farm, consisting of approximately seventy acres, for the sum of \$8,300. Of this sum, \$1,780 was paid in cash, and the balance was to be paid by the transfer of notes and a mortgage then owned by the appellants.

After making this contract, and on the 17th day of April, the appellants went into possession of the farm. Thereafter, and on the 28th day of that month, Mr. Griffith, while plowing preparatory to planting a crop, discovered what he thought might be wild snapdragon. He had never seen it before, as it did not grow where he had previously lived and farmed land. After inquiry, Griffith learned that the weed

he had discovered was wild snapdragon. He then sought Mr. Gifford and demanded his money back, as well as rescission of the contract. This the latter, after considering for a few days, declined to do. Thereafter, and during the succeeding month, the appellants vacated the place and instituted this action. Neither party to the controversy being willing to exercise control over the farm during the litigation, by mutual arrangement, the management thereof was given to a third person.

The first question is whether the presence of wild snapdragon upon the farm was of such material consequence as to justify a rescission of the contract, providing there had been misrepresentation relative to its existence. The evidence shows that wild snapdragon is a noxious weed, and when it once appears upon a farm it is practically impossible to eradicate it. So serious is its presence considered that, when it appears, some farmers build a fence around it and cover the ground with salt. The appellants offered evidence to the effect that the presence of snapdragon upon a farm would materially reduce its salable value. The respondents offered no evidence on this question. The amount of snapdragon which was discovered upon the place after the appellants went into possession thereof consisted of approximately ten patches, located near the center of the farm. These patches varied in size from about eleven by thirteen feet down to places where there was only an individual plant. The party to whom the management of the place was committed during the pendency of this litigation testified that he had covered the three larger patches with tar paper, and that it took about two hundred and fifty square feet thereof. One of the witnesses, testifying for the respondents, referred to a patch of snapdragon six feet across as "quite a large patch." Taking into consideration the character of the weed and the difficulty, if not the impossibility, of its total extinguishment, as well as the size and number of patches, together with the fact that the presence of such weed will materially reduce



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the value of a farm, we cannot hold that a misrepresentation relative thereto would be upon an immaterial matter such as would not justify the rescission of a contract.

The next question is whether there was a misrepresentation. The trial court made no formal findings of fact and conclusions of law, but recited in the judgment that wild snapdragon was growing upon the farm in the fall of the year 1915. The evidence shows that this weed has a distinctive flower and a pronounced odor, especially when cut or bruised. During the year 1915, the portion of the farm where the snapdragon was produced a crop of oats. When this crop was harvested, Mr. Gifford testified that he shocked the oats, and admitted that he shocked the oats over the very place where the snapdragon was found by Griffith. The stubs from which the plant had been cut, along with the oats, were still on the ground during the following spring. If Griffith, who had never seen snapdragon before moving upon this farm, was able to discover its presence there within twelve days after he took possession, and at a time of year when its discovery would be much more difficult than when the flower would appear later in the season, it does seem strange that its presence there was not known to the former owner, who admitted that he knew what snapdragon was when he saw it. The testimony of the Griffiths on the one side, and Gifford on the other, as to the conversation relative to snapdragon, hereinbefore referred to, cannot be reconciled. It might be said that a way of reconciliation could be found by assuming that the Griffiths might have confused this conversation with the previous conversation occurring in Latah, where Gifford admits that he stated that there was no snapdragon upon the place to his knowledge, but this assumption would overlook the fact that Mrs. Griffith was not present at the previous conversation. It seems altogether reasonable that the Griffiths, after having been warned relative to purchasing a farm with this weed upon it, and after having determined not

to purchase such a farm, should inquire specifically in relation thereto. The trial judge, in seeking to reconcile this conflicting testimony, thought that the Griffiths might have confused the conversation that they testified to as occurring upon the highway adjacent to the farm with the previous conversation in Latah, but doubtless overlooked the fact, as already pointed out, that Mrs. Griffith was not present at that conversation.

We cannot escape the conclusion that, under the evidence in this case, the appellants were entitled to a rescission of the contract. The rule undoubtedly is, as pointed out by the respondents, that fraud, where charged, must be established by clear and convincing evidence, but we think the appellants have met the requirements of this rule.

The judgment will be reversed, and the cause remanded with direction to the superior court to enter a judgment in favor of the appellants.

ELLIS, C. J., CHADWICK, MORRIS, and WEBSTER, JJ., concur.

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[No. 13290. Department Two. June 19, 1917.]

C. L. COLBURN, *Appellant*, v. C. J. WINCHELL, *Respondent*  
and *Cross-Appellant*.<sup>1</sup>

WATERS AND WATER COURSES — APPROPRIATION — NONNAVIGABLE STREAMS—STATE LANDS. Waters of a nonnavigable stream upon state lands granted for a scientific school cannot be appropriated by a nonriparian owner; since they are considered as part of the soil and as an incident to the owner's estate, and since, by Const., art. 16, §§ 1 and 2, public lands granted to the state for educational purposes are held in trust for all the people and can be disposed of only by sale at public auction to the highest bidder.

Cross-appeals from a judgment of the superior court for Klickitat county, Back, J., entered September 20, 1915, in favor of the defendant, in an action for an injunction and for damages, tried to the court. Reversed on defendant's cross-appeal.

*George F. Felts* and *I. N. Smith*, for appellant.

*Brooks & Brooks*, for respondent and cross-appellant.

#### ON REHEARING.

MAIN, J.—After the opinion in this case had been filed, 93 Wash. 388, 160 Pac. 1052, both parties presented petitions for rehearing. In the petition of the defendant and cross-appellant, our attention is called to an error in the statement of facts in the original opinion. It was there stated that the title to the land from which the appropriation of the water was made was in the Federal government at the time of the appropriation. This was incorrect. It should have been stated that, at the time the appropriation was made, the land which was crossed by the nonnavigable stream out of which the water was taken was held by the state for the purpose of a scientific school. In the year 1895, the Federal government granted to the state, together with other lands, the southeast quarter of section 11, township 4, north,

<sup>1</sup>Reported in 165 Pac. 1078.

range 10, east, W. M. Across this land flowed a nonnavigable stream, known as Old Logging Camp creek. During the year 1903, the then owner of the northwest quarter of section 13 of the same township and range went upon section 11 and attempted to appropriate the water of Old Logging Camp creek for irrigation purposes, to be used upon section 13—nonriparian land.

This corrected statement of facts presents a question which was not decided in the original opinion, and that question is whether a nonriparian owner may appropriate water from a nonnavigable stream upon state land which had been granted to the state for the establishment and maintenance of a scientific school. In *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 61 Am. St. 912, 39 L. R. A. 107, it is held that the right of a riparian owner to the waters of a nonnavigable stream is an incident to his estate, and is considered a part of the soil. It was there said:

“It is held by practically all the better authorities that the right of the riparian owner to the natural flow of the stream by or across his land, in its accustomed channel, is an incident to his estate, and passes by a grant of the land, unless specially reserved. It is not an easement in, or an appurtenance to, the land, but, as Angell says, is as much a part of the soil as the stones scattered over it.”

In *Bernot v. Morrison*, 81 Wash. 538, 143 Pac. 104, Ann. Cas. 1916D 290, it was said:

“We hold that the common law, as declared by the supreme court of the United States, so far as all unnavigable waters, whether in streams or lakes, are concerned, that is to say, waters not actually navigable, is the common law and rule of decision in this state. We know of nothing in the character of our institutions or in the state of our society militating against its application to all such waters. The declaration in our constitution, § 1 of article 21, that:

“ ‘The use of the waters of the state for irrigation, mining and manufacturing purposes shall be deemed a public use’ was never intended to destroy riparian rights in unnavigable waters.”

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Therefore, under the law of this state, the waters of a nonnavigable stream are held to be a part and parcel of the soil over which it flows. Section 11 of the enabling act, 25 U. S. Stat. L. 676, provides that all lands "herein granted for educational purposes" shall be disposed of only at public sale, and at a price of not less than ten dollars per acre. In § 17 of that act there is granted to the state of Washington, "for the establishment and maintenance of a scientific school, one hundred thousand acres (of land); . . . ." As above stated, the land was selected under that provision of the act of Congress, and the title was in the state at the time the appropriation was made.

Section 1 of article 16 of the constitution of the state provides:

"All the public lands granted to the state are held in trust for all the people, and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interests disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States."

Section 2 of the same article provides that:

"None of the lands granted to the state for educational purposes shall be sold otherwise than at public auction to the highest bidder; . . . ."

Under these provisions of the constitution, it will be seen that the lands granted to the state for the purpose of a scientific school are held in trust for all the people, and that none of such lands, "nor any estate or interest therein," shall be disposed of except in the manner there provided.

It seems to us that the language of the constitution is too plain for construction. If the water of a nonnavigable stream is to be considered as a part of the soil and as an incident to

the owner's estate in the land, a statute authorizing the appropriation by a nonriparian owner of the water of a non-navigable stream upon state land held for educational purposes would not be in harmony with the constitutional mandate. If the legislature can authorize the appropriation of water from a nonnavigable stream crossing land which the state holds in trust for the purpose of a scientific school, it could grant an estate or interest in the land without compensation, and in defiance of the constitutional provision which says that no estate or interest therein shall be disposed of unless the full value of the estate or interest, to be ascertained in the manner provided by law, be paid or secured to the state. It is a matter of common knowledge that the waters of a nonnavigable stream crossing a certain tract of land may, and in certain instances do, constitute its chief value, because without the water the land would be barren and unproductive.

We therefore conclude that the appropriation of the water from Old Logging Camp creek by a nonriparian owner cannot be sustained under the constitution of this state. The general acts of Congress relative to the appropriation of water upon government land can have no application after the title has passed from the Federal government to the state. Neither are the decisions of other states in point where the constitutional limitations are not the same as in this state. The conclusion we have reached upon the question here considered requires a different disposition of the case from that directed in the original opinion.

Upon the defendant's cross-appeal, the judgment will be reversed, and the cause remanded with direction to the superior court to dismiss the action.

HOLCOMB, PARKER, and MORRIS, JJ., concur.

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[No. 13174. *En Banc*. June 19, 1917.]

S. LOUISE ACKERSON, *Appellant*, v. J. S. ELLIOTT *et al.*,  
*Respondents*.<sup>1</sup>

**TRUSTS—CONSTRUCTIVE TRUST—PRINCIPAL AND AGENT—SECRET PURCHASE BY AGENT.** Although an agent was employed primarily to care for and rent property, a constructive trust arises in favor of the principal who, on the advice of her agent, sold property to a third person secretly acting for the agent, where it appears that the principal, a nonresident owner unacquainted with the property, relied upon the advice of the agent after he had invited and obtained her trust and confidence.

**LIMITATION OF ACTIONS—RELIEF ON THE GROUND OF FRAUD—CONSTRUCTIVE TRUSTS—DISCOVERY OF FRAUD.** A constructive trust in favor of a principal for land secretly acquired by the agent continues until discovery of the circumstances giving rise to the trust; and action therefor is not barred until three years thereafter, under Rem. Code, 159, relating to actions for relief upon the ground of fraud.

**TRUSTS—CONSTRUCTIVE TRUST—NOTICE OF FRAUD—LACHES.** A principal is not guilty of laches in failing to discover that her agent had secretly obtained title to land which he had advised her to sell, from the fact that her attorney learned of the fact three years later, where the agent was under obligation to inform her that he acquired the land for himself.

**SAME.** Since the recording of an instrument is notice only to subsequent purchasers, the recording of a deed to an agent, holding under a constructive trust for his principal, is not constructive notice of the fraud whereby the agent induced the principal to sell the land to a third person for his secret benefit.

**SAME—CONSTRUCTIVE TRUST—REPUDIATION.** Adverse and open possession by an agent, who fraudulently obtained title to the land of his principal, is not a repudiation of the constructive trust, where the principal had no knowledge of the fraud or existence of the trust.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered September 25, 1915, in favor

<sup>1</sup>Reported in 165 Pac. 899.

of the defendants, in an action for equitable relief, tried to the court. Reversed.

*John W. Roberts, Arthur E. Nafe, and Dwight L. Hartman*, for appellant.

*James B. Murphy and James B. Bruen*, for respondents.

PARKER, J.—This action was commenced in the superior court for King county by Mrs. S. Louise Ackerson against J. S. Elliott and wife, seeking recovery and reconveyance to her of a fifty-acre tract of land in that county near Seattle, which she claims was acquired from her by J. S. Elliott under such circumstances as to constitute him a trustee holding the title thereto in trust for her, and also seeking an accounting for the rents and profits of the land. After the commencement of the action and the filing of the answer, verified by J. S. Elliott in person, he died, leaving his wife surviving him, who thereupon became the executrix of his estate, and thereafter she, as executrix, being substituted as defendant, the case proceeded to trial and judgment against plaintiff denying the relief prayed for by her, from which she has appealed to this court.

In the year 1899, Mrs. Ackerson was the owner of the tract of land in question and other real property in King county. In that year she placed all of her property in King county in the hands of J. S. Elliott, as her agent for the purpose of caring for and renting the same. It does not appear that he was then given authority to find purchasers for any of the property, though he did thereafter find purchasers for some of it to whom sales were made by Mrs. Ackerson, she recognizing Elliott's services in that behalf and paying him compensation therefor measured by commissions upon the selling prices. The evidence indicates quite clearly that, while Elliott was primarily employed by Mrs. Ackerson merely as her renting agent, she came to depend upon him in some measure for information and advice concerning conditions in Seattle and vicinity affecting her property there, not only as to its



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earnings, but as to the possibility of its sale. She even advised with him to some extent in relation to the purchase of other property in Seattle. Numerous letters passed between them in which conditions touching her property interests in Seattle and vicinity were discussed at considerable length by each of them. She has been, at all times since prior to the year 1899, a nonresident of this state, and was unacquainted with the tract of land in question and its value.

As showing the nature of the relation of confidence which had grown up between them, we here notice portions of some of the letters passing between them. On January 8, 1901, Elliott wrote to Mrs. Ackerson a somewhat lengthy letter advising her of conditions in and about Seattle, as the same affected her property interests there, accompanying the letter with copies of Seattle newspapers, stating that he sent her these copies to advise her of the progress the city was making. In this letter he had considerable to say as to the advisability of her selling some of her property and also improving some of it, not mentioning the property here in question, however. On February 13, 1901, she answered this letter, evidently appreciating the information it gave her, referring to it as "your good long letter of January 8." In this answering letter she said to him, "I shall be glad to keep in communication with you and to be advised by you." And further, on referring to the possibility of a sale of certain of her property, she said, "If you have what you consider a good offer for it, submit it to me and I will lose no time in replying. I depend upon *your* advice above all others." On December 24, 1901, in a letter to Elliott, Mrs. Ackerson said, "I am remembering old friends and sending the season's greetings. I want to express to you my best wishes." Then, after mentioning matters touching the value of and possibility of a sale of certain of her property, she said, "I have such confidence in your judgment I would value your opinion if you would favor me with it as in the past." These expressions

on the part of Mrs. Ackerson manifestly were prompted by numerous and lengthy letters written to her by Elliott relating to her property interests in King county apart from the mere renting of her property. Such was the relationship existing between them and which continued up until a short time following the occurrence of the acts complained of by Mrs. Ackerson here involved, which resulted in Elliott acquiring this land from her. His agency for her ceased a short time thereafter because of the fact that all her property there had been sold, the sale to Sanderson for Elliott of this land being among the last.

Since about the year 1901, M. F. Backus, of Seattle, has represented Mrs. Ackerson as her banker in Seattle, to whom the rents collected by Elliott were turned over by him and to whom interest and mortgage loans due to Mrs. Ackerson were paid by those owing her in Seattle. Since prior to the year 1899, John P. Hartman has been attorney for Mrs. Ackerson in all her affairs requiring the services of an attorney in Seattle. Neither Backus nor Hartman has been her real estate agent for the purpose of finding purchasers of her property, neither of them being engaged in the real estate business, though they advised her to some extent touching the sale of her property there from time to time.

In January, 1903, the land in question being still in Elliott's hands as agent for the purpose of renting the same, and the relation between him and Mrs. Ackerson touching her property interests in King county being as above noticed by us, he secretly caused one Sanderson to purchase the land for him from Mrs. Ackerson for \$7,500, he furnishing to Sanderson the money therefor, a deed from Mrs. Ackerson to Sanderson being executed January 29, 1903, and a deed from Sanderson to Elliott being executed in consummation of the deal on March 2, 1903, both of these deeds being recorded in the auditor's office of King county on March 12, 1903. Sanderson, at the instance of Elliott, went to Hartman and offered \$7,500 for the land, Hartman not knowing the rela-

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tion existing between Elliott and Sanderson. Hartman was unacquainted with the land and did not know its value. He communicated this offer to Elliott, asking Elliott's advice as to whether or not he, Hartman, should advise Mrs. Ackerson to accept the offer. Elliott advised Hartman that it was a good offer and all that the land was worth, and that he thought Mrs. Ackerson should be advised to accept it. Hartman and Backus considered the matter, both being unacquainted with the value of the land and both depending upon the advice of Elliott as to its value. They concluded to advise Mrs. Ackerson to accept the offer made by Sanderson. Hartman so wrote Mrs. Ackerson, enclosing a deed for her to execute in the event she accepted the offer. She thereupon concluded to accept the offer, executed the deed and returned the same to Hartman, who delivered it to Sanderson upon the payment of the purchase price agreed upon. This was all done without any knowledge whatever upon the part of Mrs. Ackerson, Hartman or Backus that Elliott was in fact the purchaser of the land.

A short time prior to this secret purchasing of the land by Elliott, he had been offered \$10,000 for the land. The evidence, we think, shows that the land was in fact then worth more than \$7,500, that Elliott knew it was worth more, and that that fact prompted him to thus purchase it secretly. Except as to a small portion of the land, Elliott has been in possession of it by his tenants at all times since he acquired it through Sanderson from Mrs. Ackerson in 1903. For this small portion he received \$12,606 as the result of a condemnation proceeding several years after so acquiring the land. He also received additional sums for rent collected since 1903, and also a small sum for cedar shingle bolts sold from the land. Deducting the purchase price of \$7,500 paid by him through Sanderson to Mrs. Ackerson for the land in 1903, and taxes and other moneys expended by him which it is conceded he is in any event entitled to credit for as against the land and Mrs. Ackerson's claim thereto, he received \$1,136.48

more than he expended up until April 6, 1915, the date of verifying his answer in this case. Neither Mrs. Ackerson, Hartman or Backus knew that Elliott had secretly purchased the land through Sanderson in 1908 until shortly before the commencement of this action in January, 1915. There is evidence in the record indicating that both Hartman and Backus learned, possibly as early as the year 1906, that Elliott had become the owner of the land, but the evidence, we think, renders it certain that neither of them had knowledge of the manner in which Elliott became such owner until shortly before the commencement of this action. The evidence, we think, also renders it certain that Mrs. Ackerson did not learn either of Elliott's ownership of the land or of the manner of his acquiring the land until shortly before the commencement of this action.

Counsel for Mrs. Ackerson contend that Elliott's agency with reference to the land in question was such that he could not lawfully secretly purchase the land through Sanderson from her, and that when he did so purchase it he acquired it and held it in trust for her, if she should timely make election to have the sale so treated. Counsel for Elliott apparently concede that such would be the law of the case if Elliott's agency had been one to sell the land for Mrs. Ackerson, but insist that Elliott's agency was only to rent the land for her, and that, his agency being so limited, he was as free to purchase it from her in the manner he did as any stranger would be. We have not had called to our attention any decision of the courts dealing with the claimed right of a mere renting agent to secretly purchase the property of his principal which is in his charge as such agent. It seems to us, however, that the good faith and loyalty due from Elliott to Mrs. Ackerson, growing out of his relation to her and existing at the time of the purchase of the land by him through Sanderson, though at the beginning of his agency he was nothing more than a mere renting agent, forbade him from secretly acquiring any interest in the land. The trust and

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confidence he invited her to repose in him, and which she did repose in him, became such that she had a right to rely upon his acting with reference to this land, as well as her other property in King county, wholly in her interest uninfluenced by any interest of his own. It seems to us that the rights of Mrs. Ackerson as against Elliott and his estate are governed by the principles so well stated in 1 Story's Equity Jurisprudence (13th ed.), § 308, as follows:

"It is undoubtedly true, as has been said, that it is not upon the feelings which a delicate and honorable man must experience, nor upon any notion of discretion to prevent a voluntary gift or other act of a man whereby he strips himself of his property, that Courts of Equity have deemed themselves at liberty to interpose in cases of this sort. They do not sit, or affect to sit, in judgment upon cases as *custodes morum*, enforcing the strict rules of morality. But they do sit to enforce what has not inaptly been called a technical morality. If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interests, and cunning and overreaching bargains. If the means of personal control are given, they must be always restrained to purposes of good faith and personal good. Courts of Equity will not therefore arrest or set aside an act or contract merely because a man of more honor would not have entered into it. There must be some relation between the parties which compels the one to make a full discovery to the other or to abstain from all selfish projects. But when such a relation does exist, Courts of Equity, acting upon this superinduced ground in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance; for it is founded in a breach of confidence. The general principle which governs in all cases of this sort is, that if a confidence is reposed and that confidence is abused, Courts of Equity will grant relief."

In *McNutt v. Dix*, 83 Mich. 328, 47 N. W. 212, 10 L. R. A. 660, we have a striking illustration of how one inviting trust and confidence in himself was held accountable to the one he volunteered to serve, though he apparently acted in

the best of faith in acquiring the property from the owner whom he was assuming to serve. Dix was the administrator of an estate. Looking to the settlement of the estate, one Hastings contemplated buying up the interests of the heirs. Mrs. McNutt, one of the heirs, was advised by Dix, by letter, to sell her interest for \$450, apparently a fair price, sending her a deed for execution should she decide to sell. This was done by Dix as a means of prompt and economic settlement of the estate and without any notion of acquiring the interest himself or for profit to himself. The deed was executed by Mrs. McNutt, leaving a blank space for the name of the grantee, specifying \$450 as the consideration, and forwarded to Dix. He then tried to get Hastings to accept the conveyance and pay the \$450. This Hastings did not do, claiming he was then unable to do so. Later Dix inserted his wife's name in the deed and sent \$450, the agreed purchase price, to Mrs. McNutt. Later Dix sold the interest to Hastings for \$600. The action was to recover the \$150 excess received by Dix, upon the theory that he was accountable therefor to Mrs. McNutt as her trustee. Disposing of the contention made in behalf of Dix that he was at liberty to so acquire the interest of Mrs. McNutt under the circumstances shown, the court said:

"There is some force in the position taken by defendant, under the particular circumstances of this case; but there are certain legal principles which stand in the way of his being permitted to keep the money received by him on the sale of this property, if he had undertaken to act for the plaintiff as her agent in making this sale. The law is very strict in scrutinizing the conduct of those who are acting in a fiduciary relation.

"In *Moore v. Mandlebaum*, 8 Mich. 441, this court, in speaking of one who had assumed to act as the agent of another, said: 'In that confidential relation he was bound to the utmost degree of good faith, and had no right, while professing to act in that capacity, to make himself the agent of other parties for the purchase of the land he was authorized by the plaintiff to sell, nor to take any advantage of the con-

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fidence his position inspired to obtain the title himself. Nor could he make a valid purchase from his principal while that confidential relation existed without fully and fairly disclosing to his principal all the propositions he had received, and all the facts and circumstances within his knowledge, in any way calculated to enable his principal to judge of the propriety of such sale.' "

It is true, it may be said that Elliott was not assuming to act for Mrs. Ackerson in the sale of this land, but we think that the trust and confidence which he had invited Mrs. Ackerson to repose in him touching all her property interests in King county became such that he could not secretly acquire an interest in any of her property there without violating that trust and confidence.

In *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192, the subject of an agent acquiring secretly an interest in the property of his principal to which the agency relates is learnedly reviewed at length, the court holding that a clerk of a broker employed to make sale of land, who has access to the correspondence between his principal and the vendor, stands in such a relation of confidence to the vendor that if he becomes the purchaser he is chargeable as trustee for the vendor and must reconvey or account for the value of the land.

The following authorities lend support to our conclusion: *Trice v. Comstock*, 121 Fed. 620, 61 L. R. A. 176; *Hindle v. Holcomb*, 34 Wash. 336, 75 Pac. 873; *Carson v. Fogg*, 34 Wash. 448, 76 Pac. 112; *Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 100; *Easterly v. Mills*, 54 Wash. 356, 103 Pac. 475, 28 L. R. A. (N. S.) 952; 31 Cyc. 1444. We are of the opinion that, in acquiring title to the land, Elliott received and held it in trust for Mrs. Ackerson, which trust would continue until such time as she would learn of the circumstances under which he acquired it, and such further time as she would be permitted by law to disaffirm the sale.

It is further contended in behalf of Mrs. Elliott that the action is barred by the statute of limitations, and that she

and her husband had acquired title to the land before the commencement of this action by adverse possession. Being of the opinion that the land was acquired in trust for Mrs. Ackerson, we think it follows that the statute would not run against her so long as that trust relation existed. While this is an action on her part to recover the land, it is, in substance, an action for relief upon the ground of fraud, and, as we have already noticed, Mrs. Ackerson did not discover the fraud, to wit, Elliott's manner of acquiring title to the land, until very near the time of the commencement of this action. It seems plain, therefore, that she is not barred by the statute of limitations, since less than three years expired after her discovery of the fraud. Rem. Code, § 159.

In this connection it is further contended that Mrs. Ackerson has been guilty of laches. This seems to be rested upon the theory that some three years following the acquisition of the land by Elliott, Hartman and Backus, Mrs. Ackerson's attorney and banker in Seattle, knew that he had become the owner of the land. We have already noticed that their knowledge was nothing more than this, and did not go so far as to amount to knowledge of the manner in which he had acquired title to the land nor as to when he acquired title to the land. If Elliott had been under no obligation to inform Mrs. Ackerson himself that he was purchasing the land for himself there might be some room for argument of counsel in his behalf that the knowledge acquired by Backus and Hartman should be imputed to Mrs. Ackerson, but in view of Elliott's duty in this respect, we think that neither he nor his wife, as his successor in interest, can base any claim upon the knowledge so acquired by Backus or Hartman, even if we should concede that their knowledge was of the manner in which Elliott had acquired the title instead of the mere fact that he had acquired the title.

Some contention is made that the recording of the deeds from Mrs. Ackerson to Sanderson and from Sanderson to Elliott in March, 1903, was notice to Mrs. Ackerson, Hart-



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man and Backus. Plainly this is not so, since it seems to be well settled law that the recording of an instrument is only constructive notice to those acquiring interests subsequent to the execution of the instrument. There was nothing prompting either Mrs. Ackerson, Hartman or Backus to look to the public records to discover the fraud practiced upon Mrs. Ackerson, of which they had no suspicion until very shortly prior to the commencing of this action. *Maurer v. Reifschneider*, 89 Neb. 673, 132 N. W. 197, Ann. Cas. 1912C 643. Our decision in *Johnstone v. Peyton*, 59 Wash. 436, 110 Pac. 7, is in harmony with this view, though that involved the placing upon record a judgment which had been fraudulently obtained by default. It was there held that the defendant, having no actual knowledge of the rendering of judgment against him, was not bound by the record thereof as notice.

It is further suggested that there was an open repudiation of the trust by the adverse possession of Elliott during the twelve years following the acquiring of the title by him. We may concede that his possession was so open and plain as to advise all persons that he was claiming title to the land, but this was no evidence to any one that he had acquired the property fraudulently in violation of his duty to Mrs. Ackerson in 1903. Had she been advised of Elliott's manner of acquiring the land, which gave rise to the trust in her favor, and failed to make timely claim to the land after discovery thereof, this so-called repudiation of the trust by Elliott and holding of possession during these years might have defeated Mrs. Ackerson's claim here made, but any repudiation of the trust to be available against Mrs. Ackerson must have been such as advised her of the existence of the trust as well as of its repudiation, under the circumstances of this case.

We conclude that the judgment must be reversed and Mrs. Ackerson awarded the land, and that the Elliott estate is bound to account to her for all sums received by Elliott from the sale of a portion of the land through condemnation pro-

ceedings, rent collected and shingle bolts sold therefrom, less the moneys paid out by him to Mrs. Ackerson through Sanderson as the purchase price of the land, and moneys paid out by him for taxes and other expenses in connection with his holding the land. This, as we have noticed, left a balance due Mrs. Ackerson, at the time of the commencement of this action, of \$1,136.48, the amount of which is conceded to be correct by counsel for Mrs. Elliott. Indeed, this result is arrived at from Elliott's own statement of the moneys received and paid out by him, attached to his answer.

The case is remanded to the superior court with directions to enter a decree in favor of Mrs. Ackerson, quieting her title to the land and directing its reconveyance to her by a commissioner. The superior court is also directed to render a judgment in favor of Mrs. Ackerson against the estate of J. S. Elliott, deceased, to be paid in the due course of administration, for the sum of \$1,136.48, or in the event additional sums have been paid out by Elliott or Mrs. Elliott, as executrix, for taxes upon the land or other proper expenses in connection therewith, and additional rents and profits have been derived by them from the land since the commencement of this action, then the superior court is directed to take an accounting thereof and render judgment for the sum so found to be due Mrs. Ackerson.

MOUNT, HOLCOMB, CHADWICK, MORRIS, and WEBSTER, JJ., concur.

FULLERTON, J. (dissenting)—I think the facts of this case justify an affirmance of the judgment below. I therefore dissent from the conclusion of the majority.

ELLIS, C. J., and MAIN, J., took no part.

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[No. 13766. Department One. June 19, 1917.]

GEORGE E. MEZGER *et al.*, *Appellants*, v. HAZELWOOD  
IRRIGATED FARMS COMPANY *et al.*, *Respondents*.<sup>1</sup>

**VENDOR AND PURCHASER—RESCISSION BY VENDEE—GROUNDS.** Under a contract for the sale of land requiring the vendor to set out and care for an orchard for one year, failure to properly care for the trees is not ground for rescission of the sale, the remedy being an action for damages.

**APPEAL—REVIEW—FINDINGS.** Upon conflicting evidence, findings will not be disturbed when supported by all the evidence.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered September 11, 1915, upon findings in favor of the defendants, in an action for rescission, tried to the court. Affirmed.

*Carl Ultes, Jr.*, for appellants.

*Cullen, Lee & Matthews*, for respondents.

**MAIN, J.**—The purpose of this action was to rescind a contract for the purchase of real estate. The cause was tried to the court without a jury, and resulted in findings of fact, conclusions of law, and a judgment denying the rescission. From this judgment, the plaintiffs appeal.

The facts are these: On January 25, 1909, the appellants, being then residents of the city of Chicago, in the state of Illinois, purchased from the Hazelwood Irrigated Farms Company, a corporation doing business at Spokane, Washington, five acres of irrigated land, located near the city of Spokane. The selling agent through which this transaction was consummated was Neely & Young, a corporation located in the city of Spokane. The negotiations leading up to the purchase of the land were conducted by correspondence. The appellants at no time saw the land prior to February 13, 1914, when they came west for the

<sup>1</sup>Reported in 165 Pac. 872.

purpose of locating thereon. By the terms of the contract of purchase, the Hazelwood Irrigated Farms Company was to prepare the land, set it to trees, and care for the same for a period of one year. In addition to this, it was contracted between the parties that the Hazelwood Irrigated Farms Company would cultivate and take care of the orchard for a period of four or five years additional for a stipulated consideration. When the appellants came west and viewed the land and the trees thereon, they were dissatisfied in two respects: First, that the trees were not in as good condition as they should be; and second, that there was a depression on the south end of the tract next to the highway which rendered it undesirable as a home site. After tendering a deed to the Hazelwood Irrigated Farms Company, demanding the return of their money, and giving notice of a rescission, the appellants instituted the present action.

The fact that the trees had not been properly cared for, if it be a fact, would not furnish a ground for rescission, because the remedy for a breach of that portion of the contract would be an action for damages. *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525, 99 Pac. 586, 21 L. R. A. (N. S.) 823; 3 Elliott, Contracts, § 2049.

If we understand the contention of the appellants correctly, they claim that it was represented to them, prior to the purchase, that the land was capable of producing a commercially bearing orchard, and that the trees would come into bearing between four and five years after planting, and that the tract was a suitable place for a home, all of which, it is claimed, was false and untrue.

There is little evidence in the record that would sustain the contention that the tract of land was incapable of producing a commercially bearing orchard, and that the trees would not come into bearing within five or six years.

The principal contention, however, is that the tract of land was not suitable for a home, because there was a depression on the south end thereof, upon which, during the spring

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rains and freshets, water would accumulate. The evidence upon the extent to which the water would cover the land, its depth, and the duration of time that it would remain thereon was conflicting. If that offered by the appellants correctly described the extent, depth, and duration of the time that the water remained upon the land, the representation that the tract was suitable for a home site would doubtless be fraudulent. On the other hand, if the evidence offered by the respondents correctly presents the situation, there was no false representation. The trial court found that the representations made by the respondents were in good faith and were, in fact, true, and that the particular tract in question was suitable for a home. After a careful consideration of all the evidence, we think it supports the findings and judgment of the trial court.

There are a large number of assignments of error by which questions of fact only are presented. It would serve no useful purpose to review in detail the evidence of the respective parties, balancing one against the other, and show wherein the preponderance lies by pointing out the weakness of one and the strength of the other. It is sufficient to say that, in our opinion, the appellants failed to establish their charge of fraud, and, as above stated, the question of damages for breach of the contract to properly care for the trees cannot be determined in this action.

The judgment will be affirmed.

ELLIS, C. J., CHADWICK, MORRIS, and WEBSTER, JJ.,  
concur.

[No. 13806. Department One. June 19, 1917.]

DAISY D. BLYSTONE *et al.*, *Respondents*, v. WALLA WALLA  
VALLEY RAILWAY COMPANY, *Appellant*.<sup>1</sup>

DAMAGES—PERSONAL INJURIES—CONTRIBUTORY CAUSE—EVIDENCE—SUFFICIENCY. The evidence warrants an inference that rupture of a Fallopian tube was caused or contributed to by a fall, where it appears that pain resulted at once and continued in intensity for three days until an operation was performed, and a physician testified that pus tubes may lie dormant and cause no trouble through life, but may be ruptured by an exciting cause such as a fall.

WITNESSES — IMPEACHING OWN WITNESS — PRIOR STATEMENTS. Where a witness for the plaintiff gave testimony favorable to the defendant upon a material point in contradiction of a previous signed statement favorable to the plaintiff, the plaintiff may introduce the prior statement for the purpose of affecting the credibility of the witness.

APPEAL—PRESERVATION OF GROUNDS—OBJECTION TO EVIDENCE—LIMITING EFFECT. In the absence of a request that a prior contradictory statement impeaching a witness be limited to the special purpose of impeachment, error cannot be predicated upon the admission of the statement.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered April 18, 1916, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a passenger on a street car. Affirmed.

*John A. Laing and Sharpstein, Pedigo, Smith & Sharpstein*, for appellant.

*E. L. Casey and A. S. Bennett*, for respondents.

MAIN, J.—The plaintiffs in this action are husband and wife. The defendant is a corporation, and owns and operates a street railway in the city of Walla Walla. The purpose of the action was to recover damages alleged to have been sustained by Mrs. Blystone through the negligence of

<sup>1</sup>Reported in 165 Pac. 1049.

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the defendant. The cause was tried to the court and a jury, and resulted in a verdict and judgment in favor of the plaintiffs. From this judgment, the defendant appeals.

The facts are these: On the 28th day of May, 1914, and for some time prior thereto, Daisy D. Blystone, who will hereafter be referred to as the respondent, was employed at the Grand Hotel, in Walla Walla. In going from her home to work, and returning therefrom, she traveled over the appellant's street railway. On the morning of the day mentioned, shortly after the hour of seven o'clock, the respondent left her home for the purpose of going to work, and traveled from a point near her home to the business district of the city, where she was accustomed to leave the car. The point where the respondent ordinarily left the car was just south of the intersection of Main street and Second street, this being a place where the car usually stopped. About midway of the block, south of Main street and intersecting Second street, is an alley. On the morning in question, the respondent, before the car reached this alley, arose from the seat in which she was sitting and approached the rear end of the car, preparatory to alighting therefrom when it came to its usual stopping place. When the car had reached a point at or near the alley, it stopped, as the evidence shows, in a "violent, sudden and in an unusual manner." By reason of this sudden and unusual stopping of the car, the respondent was thrown against the door thereof, precipitated down the steps, and fell upon the street. She got up from the place where she had fallen and went on to her work. On this day, another employee of the hotel assisted her with the work she was expected to do. On each of the two days following, she returned to work. On the next day, which was Sunday, she called a physician. The physician, after treating the patient for some days, performed an operation and removed one of her ovaries, and also one of the Fallopian tubes. The Fallopian tube was ruptured, and pus was oozing therefrom.

At the conclusion of the evidence offered on behalf of the respondent, the appellant moved for a nonsuit on the ground that the evidence was not sufficient to take the case to the jury. This motion was overruled, and the appellant stood upon the record as then made and offered no testimony in its own behalf. The cause was submitted to the jury, and resulted in a verdict as above stated. The evidence of other facts will be referred to in connection with the consideration of the points presented by this appeal.

The first question is whether the trial court erred in refusing to grant the motion for a nonsuit. It is claimed that the nonsuit should have been granted because the respondent had failed to show that any negligence of the appellant contributed to the respondent's condition, and for the further reason that, from the evidence, it was probable that the respondent's condition was due to other and different causes, wholly apart from any act of the appellant. It is not claimed that the stopping of the car in a violent, sudden and unusual manner would not be negligence. The question, then, is whether the negligent act of the appellant in so stopping the car produced the condition which rendered necessary the operation performed upon the respondent. The evidence shows that, for a year and a half prior to the accident, she had been in good health. The physician who performed the operation, and who had been the respondent's family physician for a number of years prior thereto, testified that a woman "may go through life with two pus tubes and have no trouble," because the pus tubes may lay dormant. He further testified that an exciting cause like a fall, or a blow, may liberate the adhesion and permit the pus to go into the abdominal cavity, where it sets up peritonitis. The physician testified further that there were causes other than those mentioned which might produce the same result. Testifying as to this particular case, the doctor gave it as his opinion that the fall did not produce the pus tube, but that it may have ruptured it. He did not testify that the



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rupture was probably caused by the accident. The respondent testified that, immediately after the accident, she had a pain in her side, and that she was unable to do her work that day as usual. During the three days following this, she gradually grew worse each day until the physician was called. The coemployees at the hotel testified that the respondent, on the morning of the accident, when she reached the hotel, complained of a pain in her side. This evidence warrants the inference that the breaking of the pus tube was caused or contributed to by the accident. The testimony shows a sequence of events, such as physical symptoms, beginning at once and increasing in intensity until the operation was performed.

The probabilities of the case were to be weighed and decided by the jury. When the respondent offered evidence which made it appear more probable that the injury came in whole or in part from the appellant's negligence than from any other cause, the jury was warranted in finding in her behalf. *Atwood v. Washington Water Power Co.*, 79 Wash. 427, 140 Pac. 343. The trial court did not err in refusing to withdraw the case from the consideration of the jury.

The other point urged, if sustained, would not result in a dismissal but in a retrial. One J. A. Dunham, who was a passenger upon the street car at the time the accident occurred and witnessed it, was called to testify in behalf of the respondent. Prior to the trial, this witness signed a written statement wherein the details of the accident were attempted to be set forth. In certain particulars, the testimony of the witness and the statement are not harmonious. While the witness was on the stand, the statement was presented to him, and he was cross-examined thereon. Subsequently another witness testified as to the manner in which the statement had been prepared and the signing thereof by Dunham. The written statement was offered in evidence and was received over objection. Two of the particulars in which the statement and Dunham's testimony did not coincide were these: The statement recited

that "the car stopped very sudden and in an unusually sudden manner." The witness testified that the car "stopped as they usually do; maybe a little bit quicker at that time. When they throw on the brakes and take them off there is a rebound of the car any time." In the statement, also, he said that the car was stopped "near the intersection of the alley between Alder and Main street with Second street," in his testimony, that it stopped in the usual place "closer to Main street" than the alley.

If the testimony correctly presents the facts, the appellant company would not be guilty of negligence. If the statement correctly describes the manner of the accident, it would furnish a basis for the charge of negligence in the manner of stopping the car. The statement, therefore, would contradict the witness upon material facts. The rule is that, where a party calling a witness is taken by surprise by reason of affirmative testimony prejudicial to the interest of the party by whom he was called, prior contradictory statements may be shown for the purpose of affecting the credibility of the witness. 5 Jones, Commentaries on Evidence, § 855; *State v. Catsampas*, 62 Wash. 70, 112 Pac. 1116. Under this rule, the respondent had a right to offer the writing for the purpose of showing the contradictory statements made by the witness.

Some complaint is made that the writing was not offered and received solely as impeaching testimony. No request was made by the appellant that its effect be so limited. If the appellant desired that the evidence be limited to a special purpose, it should have requested an instruction so limiting it. In the absence of such a request or instruction, error cannot be predicated upon the admission of the statement. *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519.

The judgment will be affirmed.

ELLIS, C. J., WEBSTER, MORRIS, and CHADWICK, JJ., concur.

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[No. 13681. Department One. June 19, 1917.]

**ELSIE G. RUGE, *Respondent*, v. EDWARD C. RUGE, *Appellant*.**<sup>1</sup>

**DIVORCE—ALIMONY—DECREE—RES ADJUDICATA—POWER TO MODIFY PERMANENT ALIMONY.** Where a decree of divorce is an absolute one and there are no minor children, and it awards periodical installments of permanent alimony without reserving to the court the power to subsequently make further orders, the award of alimony is *res adjudicata*, and the court, in the absence of statute, has no inherent power to change or modify the decree to meet altered conditions after the time limited by statute for the modification of judgments, the defendant not having appealed or attacked the judgment for fraud or mistake.

**SAME.** The fact that a husband, unable to pay permanent alimony, cannot be cited for contempt, does not suspend the decree or authorize its modification, but only deprives the wife of one of the means of enforcing it until such time as the husband is able to pay it.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered October 6, 1915, upon sustaining a demurrer to the petition, dismissing an application to modify a decree of divorce respecting alimony. Affirmed.

*S. M. Bruce and Romaine & Abrams*, for appellant.

*Craven & Greene*, for respondent.

**WEBSTER, J.**—This is an appeal from an order and judgment sustaining a demurrer to and dismissing a petition, the purpose of which was to obtain an order modifying a decree for alimony, payable in periodical installments, as fixed by a decree of divorce rendered in an action between the parties to this proceeding by the court to which the petition was addressed. The material facts are as follows:

On November 16, 1912, a decree was rendered by the superior court of Whatcom county dissolving the bonds of marriage theretofore existing between plaintiff and defendant and adjudging, among other things, that the defendant

<sup>1</sup>Reported in 165 Pac. 1063.

and petitioner pay to the plaintiff as alimony the sum of \$125 per month so long as the plaintiff should live. The decree was based upon findings to the effect, that the defendant had been guilty of cruelty toward the plaintiff; that he was a regularly licensed physician with a lucrative practice, and was actually earning from \$500 to \$1,000 per month; that plaintiff was physically frail and delicate and would never be well and strong; that she was not able to support or maintain herself by her own exertions, and that she was totally without means of support. On February 23, 1915, the defendant filed a petition entitled in the original cause, wherein he alleged in substance that, since the entry of the decree in the divorce action, the plaintiff had become well and vigorous; that his practice as a physician had materially fallen off; that business conditions had greatly changed, and that he was not financially able to pay the installments of alimony. He prayed that the amount of alimony be reduced; that the same be converted into a gross sum, to the end that he might pay the same either at one time or at such periods and in such installments as the court saw fit to provide. It is conceded that there were no children as the result of the marriage between plaintiff and defendant, and there is no reservation or provision in the decree whereby the allowance of alimony is subject to the further orders of the court.

To this petition, the plaintiff interposed a demurrer upon the grounds, among others, that it did not state sufficient facts to entitle defendant to the relief prayed, and that the court was without jurisdiction to entertain it. The demurrer was sustained, and the defendant electing to stand upon his petition, the same was dismissed. Defendant appeals.

The question presented for our consideration is this: Has the superior court which rendered the decree in the divorce action jurisdiction to modify the same in respect to the periodical installments of permanent alimony provided for therein, the divorce being an absolute one, there being no minor children of the parties, there being no provision in the

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decree reserving to the court the power to subsequently make further orders relating to the alimony, but being absolute and final upon its face, there being no statute in this jurisdiction expressly, or by necessary implication, conferring upon the court the power to change or modify decrees in such cases to meet altered conditions, the defendant not having appealed from the decree nor moved or petitioned the court for its modification within the time limited by statute, and the decree not being attacked on the ground of fraud or mistake.

The question thus presented is one of first impression in this court, is exceedingly vexatious, and one upon which the authorities are in an unsatisfactory condition. Because of the great importance of the question, not alone to the defendant in this case, but to the public as well, and in the hope of bringing something approximating order out of the chaotic mass of judicial expression upon the question, we have made a painstaking examination of the authorities. From our investigation we are induced to conclude that what at first blush appears to be a hopelessly entangled skein of discordant and conflicting cases, upon closer analysis will be found not to be such, but that, by resorting to scientifically sound fundamental principles and by keeping in mind well established lines of demarcation, the question is one upon which there is not great actual conflict. Upon careful analysis, the cases seem naturally to arrange themselves into six well defined and distinct classes, each class being based upon sound fundamental principles and the rule pertaining to it being the result of clear logic. These classifications are as follows:

I. Where the decree in the main action is one granting a divorce *a mensa et thoro*, which in modern parlance we refer to as a decree for separate maintenance. Cases falling within this class are controlled largely, if not entirely, by the thought that, inasmuch as the power of the court to award alimony in such cases is a power incident to the jurisdiction to regulate the rights of the parties growing out of and

pertaining to the marital status, and this status being unaffected by the decree for legalized separation but continuing to exist, the power to modify the decree in respect to alimony to meet changed or changing conditions likewise continues to endure. This rule seems to have had its origin in the ecclesiastical courts, where absolute divorces were never granted. These tribunals sometimes entered decrees of annulment for causes which rendered the marriage void *ab initio*, but such decrees were not in the proper sense of the term divorces; they amounted merely to an official declaration of a preexisting fact, viz., that there had never been a valid marriage between the parties. Absolute divorces were infrequently granted in England by acts of Parliament, and hence it is that the granting of such divorces is, historically, a legislative function. While inherently the matter of granting a divorce involves the judicial process, historically and theoretically, the power to grant a divorce *a vinculo* is purely legislative. Consequently there is no inherent jurisdiction in the common law courts to grant a divorce absolutely severing and cancelling the marital bonds; but they have only such power with respect to granting absolute divorces as the legislative department in the particular jurisdiction sees fit to expressly confer upon them, or such as are necessarily implied from those expressly given them. In an early English case, however, after careful consideration and debate, it was determined that the rules announced and acted upon by the ecclesiastical courts were part and parcel of the common law. In cases of divorce from bed and board, therefore, the courts of the common law, exercising the powers formerly exercised by the ecclesiastical courts, have authority to modify decrees relating to alimony. The continued existence of the status of marriage, upon which the power to grant decrees of alimony depends, carries with it the continuing power to modify or alter the allowance of alimony to meet new conditions.

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II. The second class includes the cases where the alimony awarded is temporary or *pendente lite*, as distinguished from permanent. In these cases the power to modify exists for reasons which are perfectly obvious. While the cause is still pending in the court of first instance, the power to make any appropriate order in the premises clearly exists. The court has the same power to modify its order with respect to temporary alimony that it has to make any other appropriate order in a case pending in court.

III. This class includes cases where there are minor children of the parties to the divorce action, and the courts of all the states are at one upon the proposition that, so far as the decree of alimony is for the benefit of the minor children of the spouses, the power to modify the decree continues so long as there are minor children under the protection of the court. While in cases dealing with this aspect of the question the courts have not always paused to state the fundamental principle upon which the right to modify is based, it is manifest in reading them that the dominant thought and controlling circumstance in the cases is the fact that there are minor children to be cared for as wards of the court. As it seems to us, the true basis upon which the power to modify the decree in these cases rests is that out of the marital relation springs a new relationship, viz., that of parent and child. Palpably neither executive edict, enactment of legislature, nor decree of court can change the relationship existing between parent and child. The courts may decree that the marital tie shall be absolutely severed and the parties be placed, so far as the law is concerned, in the same situation that they occupied prior to the solemnization of the marriage ceremony; but they cannot alter or modify the fact that a father is the parent of his offspring. This parental relationship, springing as it does from the relationship of marriage, is to this extent incident to the marital status. But the duty of the father, if he has means with which to do so, to support his infant children springs imme-

diately from the parental relationship. As this relationship, incidental as it is to the marriage state, continues to exist after the status out of which it arose has been terminated, either naturally, as by death, or artificially, as by divorce, the duty incident to that continuing relationship still exists. The right of the wife to alimony arises immediately out of the marriage contract, but the right of the child to support at the hands of its parents springs from the incidental relationship which had its origin in marriage, to wit, that of parent and child. The court, therefore, acting upon this relationship as one of the things brought to it by the divorce action, has the power to modify or alter its decree so long as there are minor children under the protection of the court.

IV. Comprising this class are the cases where the court, by express provision in its decree, reserves to itself either all or a portion of its power to provide alimony for the wife or maintenance for the children. In such cases, the decree is not final and conclusive as a matter of law, because it does not purport to be final and conclusive as a matter of fact. The reservation in the decree plainly indicates an unfinished determination of the judicial mind; that is, the court has not completely disposed of the case. The power of the court not having been exhausted, it reserves to itself the right to exercise the unexhausted portion of its power in such manner as changed conditions and circumstances may indicate to be just. As a judgment in any kind of action thus inconclusive and incomplete is not final, so, also, it is not final in a decree relating to alimony. The cases are in harmony that, where the power to modify is thus expressly reserved in the decree, the tribunal reserving it has the power to exercise it to meet changed or changing conditions thereafter arising.

V. In this division are included the cases where, by statute in the particular jurisdiction, power is expressly conferred upon the court to, from time to time, on the petition of either of the parties, revise or alter its judgment or decree



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respecting the amount of alimony or maintenance. Comment on this class of cases is unnecessary. Suffice it to suggest that the legislative department of the state, being the repository of all the power concerning absolute divorce and its incidents, may, if it sees fit, delegate this power to courts, in the absence of constitutional inhibition.

VI. In this class fall all of the cases not included in the foregoing classifications, viz., cases where the divorce is absolute, the alimony awarded is permanent, there are no minor children, there is no express reservation in the decree, and there is no statute in the particular jurisdiction expressly, or by necessary implication, conferring upon the court the authority to modify or alter its decrees in respect to alimony for the support of the wife. It is in this class that the case now under consideration is included.

The question, May decrees in this class of cases be modified? seems to carry its own answer. The status to which the power to award alimony is incident having, by judicial mandate, ceased to exist; the court having exercised all of the power in the premises that it possessed; there being no continuing relationship of parent and child to which the power to modify may be referred, the alimony in question involving the right of the wife only; the judgment or decree, by its terms, purporting to be final and conclusive upon the question; and there being no statute conferring upon the court the power to modify, there is no other source of authority to which we may look. The answer is scientifically and logically irresistible that such power does not exist. We must disabuse our minds of the thought that there is any peculiar mystery attaching to decrees of divorce and alimony merely because they are such. But if they and their incidents are to be treated differently from ordinary judgments and decrees, it must be so because of some scientifically and logically sound basis upon which they can be considered as exceptions to the general rules. Unless this be true, our boast that the law is a science is a mockery and a sham, and judicial tri-

bunals will be left to embark upon a thick and uncertain sea with neither chart nor compass. In such a situation, the judicial expressions upon the question, in the very nature of things, will result in a mass of conflicting and discordant utterances, referable to no principle of law, either substantive or adjective. Fortunately, however, the courts of the country have not fallen into the error of considering a decree for alimony or maintenance as a thing apart, but, speaking generally, have developed a jurisprudence pertaining to the question in keeping with sound fundamental principles. It is elementary that an adjudication by a court having jurisdiction of the subject-matter and of the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties ought to have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. Consequently, when the question of alimony is in fact actually litigated and finally determined in the divorce action, as it is in this class of cases, a judgment or decree in the action operates as *res judicata* upon the question of alimony. We therefore confidently assert that it is sustained, both in principle and by the great weight of authority, that, where permanent alimony is awarded as incidental to the granting of an absolute divorce, and there are no minor children of the parties, and the court does not reserve to itself the right to thereafter exercise an unexhausted portion of its power, but actually exhausts its jurisdiction at one time, and there is no statute conferring upon the court the power to modify or alter its decrees in respect to the allowance of alimony to meet new conditions thereafter transpiring, and the time for appeal or review has expired, and the period limited by law within which judgments may be modified on motion or petition has elapsed, and the judgment is not attacked on the ground of fraud or mistake, the court has absolutely no jurisdiction to change its decree, but possesses only the right

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to enforce obedience to it. *Sammis v. Medbury*, 14 R. I. 214; *Sampson v. Sampson*, 16 R. I. 456, 16 Atl. 711, 3 L. R. A. 349; *Smith v. Smith*, 45 Ala. 264; *Petersine v. Thomas*, 28 Ohio St. 596; *Kamp v. Kamp*, 59 N. Y. 212; *Kerr v. Kerr*, 59 How. Pr. (N. Y.) 255; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Coffee v. Coffee*, 101 Ga. 787, 28 S. E. 977; *Spain v. Spain* (Iowa), 158 N. W. 529; *Hardin v. Hardin*, 88 Tex. 617; *Shepherd v. Shepherd*, 1 Hun 240; *Livingston v. Livingston*, 173 N. Y. 377, 66 N. E. 123, 93 Am. St. 600, 61 L. R. A. 800; *Fries v. Fries*, 1 McArthur (D. C.) 291; *Howell v. Howell*, 104 Cal. 45, 37 Pac. 770, 43 Am. St. 70; *Mitchell v. Mitchell*, 20 Kan. 665; *Stratton v. Stratton*, 73 Me. 481; *Mayer v. Mayer*, 154 Mich. 386, 117 N. W. 890, 129 Am. St. 477, 19 L. R. A. (N. S.) 245; *Martin v. Martin*, 6 Blackf. (Ind.) 321; *Walker v. Walker*, 155 N. Y. 77, 49 N. E. 663; *Bacon v. Bacon*, 43 Wis. 197; *White v. White*, 130 Cal. 597, 62 Pac. 1062, 80 Am. St. 150; *Silliman v. Silliman*, 66 Ore. 402, 133 Pac. 769; *Buckminster v. Buckminster*, 38 Vt. 248, 88 Am. Dec. 652 (note); *Johnson v. Johnson*, 12 Daley's (N. Y. C. P.) 232; *Methvin v. Methvin*, 15 Ga. 97, 60 Am. Dec. 664 (note); 2 Am. & Eng. Ency. Law (2d ed.), p. 135; 1 R. C. L. 946; 9 R. C. L. 439; Brown, Divorce, p. 278; 2 Nelson, Marriage and Divorce, § 933-a; Stuart, Marriage and Divorce, § 366.

Mr. Bishop in his valuable treatise on Marriage, Divorce and Separation, vol. 2, § 872, states:

"Because the procedure of a court always bends with the right to which it gives effect, it early became and it remains the doctrine in the country whence our laws are derived, and it is accepted and practiced upon by a considerable proportion of our American tribunals, that the court may at any time and from time to time, on any change in the circumstances of the parties, increase or reduce the sum allotted for alimony, temporary or permanent."

In support of this rather broad general statement, the following cases, which we are about to notice, are cited:

*Otway v. Otway*, 2 Phillim. 109. In this case, decided by

the ecclesiastical court, the divorce was one from bed and board, and the question of permanent alimony was expressly reserved in the decree. The case of *Cook v. Cook*, reported in the same volume at page 40, upon which the *Otway* case was based, is likewise a case of divorce *a mensa et thoro*. *Rogers v. Vines*, 6 Ire. Law (28 N. C.) 293: In this case the divorce was one from bed and board. *Richmond v. Richmond*, 1 Green Ch. (2 N. J. Eq.) 90: This case is based squarely upon a statute conferring upon the court the power at any time, on a change of circumstances, to vary the allowance of alimony by increasing or diminishing it, and the decree involved the rights of minor children. *Bursler v. Bursler*, 5 Pick. (Mass.) 427: The divorce in this case was from bed and board. *Holmes v. Holmes*, 4 Barb. (N. Y.) 295: This case is one where the divorce was *a mensa et thoro*. *Barber v. Barber*, 1 Chand. (Wis.) 280: The decree in this case granted a divorce from bed and board. *Sheafe v. Sheafe*, 36 N. H. 155: The opinion in this case is based upon a statute of New Hampshire expressly empowering the court to modify its decrees in such cases. *Saunders v. Saunders*, 1 Swab. & Tr. 72: The divorce in this case was from bed and board. *Foote v. Foote*, 22 Ill. 425: The decree involved the rights of minor children, and was rendered in a state having a statute expressly conferring upon the courts the power to modify decrees in divorce cases. *Sparhawk v. Sparhawk*, 120 Mass. 390: The decision is based upon a statute conferring the power to modify. *Coad v. Coad*, 41 Wis. 23: This case is based upon a statute of Wisconsin expressly conferring the power to modify decrees in such cases. *Williams v. Williams*, 29 Wis. 517: The power exercised was expressly reserved in the decree and the case is based upon a statute. *Waters v. Waters*, 49 Mo. 385: The allowance was for temporary alimony made, of course, during the pendency of the action. *Ellis v. Ellis*, 13 Neb. 91, 13 N. W. 29: This case is based upon an

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express statute of Nebraska empowering the court to modify its decrees in reference to alimony from time to time. *Olney v. Watts*, 48 Ohio St. 499, 3 N. E. 354: This case, stripped from the authorities upon which it is based, would seem to sustain the general statement in the text that all decrees for alimony might be modified or changed to meet new conditions. It is, however, based in part upon Mr. Bishop's former work on the Law of Marriage and Divorce, § 429, where the same authorities are referred to as those above noted and reviewed. It also cites the rule announced by Dr. Lushington in the ecclesiastical court where, as we have already observed, the decrees were always from bed and board merely.

In addition to the authorities contained in the foot note to Bishop on Marriage, Divorce and Separation, the cases of *Fisher v. Fisher*, 32 Iowa 20; *McGee v. McGee*, 10 Ga. 477; *Wheeler v. Wheeler*, 18 Ill. 39, and *Lockridge v. Lockridge*, 2 B. Mon. (Ky.) 258, are cited. In the *Fisher* case, the opinion is based upon a statute of Iowa providing that, after a divorce is granted, subsequent changes may be made by the court in reference to maintenance of the wife, when circumstances render them expedient. The *McGee* case was one dealing with the question of temporary alimony. In the *Wheeler* case, the question was considered on appeal from the original decree, so that palpably no question of subsequent modification was involved, and the rather loose, general language contained in the opinion with reference to the right to modify such decrees was pure dictum. In the *Lockridge* case, the decree granted a divorce from bed and board only, as will be seen from the statement of the case on a former hearing in the Kentucky court of appeals. *Lockridge v. Lockridge*, 3 Dana 28, 28 Am. Dec. 52. It is therefore evident that the authority upon which the *Olney* case is based does not warrant the conclusion reached in it. The soundness of this case has also been questioned by the learned

tribunal which rendered it. In *Law v. Law*, 64 Ohio St. 369, 60 N. E. 560, it is said:

"The view presented by counsel for the plaintiff in error is that the terms of the original decree, not being affected by fraud or mistake, were conclusive upon the subject of alimony and not subject to modification for any reason. Since no question was reserved by the decree for future consideration, that view receives strong support from *Petersine v. Thomas*, 28 Ohio St. 596, and from the general course of decisions upon the subject. Authority for the subsequent modification of the decree is, however, said to be found in the later case of *Olney v. Watts*, 43 Ohio St. 499. . . . If it be assumed that the case was correctly decided, it affords no warrant for the present judgment."

Thus it will be seen that not one of the cases, save the *Olney* case, is in point in this case. They are all distinguishable in that they are either divorces from bed and board, cases relating to alimony *pendente lite*, where the rights of children are involved, where the power is expressly reserved in the decree, or is based upon a statute expressly conferring it. Not one of them, except the *Olney* case, is a case where the decree was absolute, the alimony permanent, the rights of children were not involved, there was no reservation in the decree, and no statute authorizing the change. And we have endeavored to show that the *Olney* case is not sound, in that the authorities upon which it is based do not sustain it.

14 Cyc. at page 784, in discussing the question here under consideration, uses this language:

"A decree for permanent alimony is subject to modification because of fraud or mistake in the same manner and under the same circumstances as other decrees. The general rule would seem to be that, where the divorce is absolute a decree for permanent alimony containing no reservation of the power of modification cannot be altered after the expiration of the time within which an appeal may be perfected, although it has been held that the court may modify a decree for alimony at any time upon proper allegations of the changed conditions and circumstances of the parties."

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In support of the latter statement, it cites a number of the same cases referred to by Mr. Bishop and the cases cited in *Olney v. Watts, supra*, which we have already reviewed. In addition the following cases are cited, upon which we shall comment in passing:

*Stevens v. Stevens*, 31 Colo. 188, 72 Pac. 1061: The entire opinion in that case is as follows:

“By virtue of the general equity powers of a court granting a divorce as well as by virtue of the provisions of Sec. 9 of the Divorce act, Session Laws, 1893, p. 240, such court has the authority to modify the decree relative to alimony payable in the future, and the custody and control of minor children, as the changed circumstances of the parties may render necessary and just. *Richmond v. Richmond*, 2 N. J. Eq. 90; *Sheafe v. Sheafe*, 36 N. H. 155; *Coad v. Coad*, 41 Wis. 23; *Foote v. Foote*, 22 Ill. 425. There are no decisions of this court or the court of appeals to the contrary. The judgment of the county court is reversed, and the cause remanded, with directions to overrule the demurrer to the petition. Reversed.”

It will be seen that the cases cited have all been distinguished in discussing the cases cited by Mr. Bishop. Justice Steele wrote a dissenting opinion which was concurred in by the Chief Justice, wherein he pointed out that the Colorado statute did not confer the power to modify, and in the course of the opinion said:

“The authorities cited in the opinion are not in point. In New Jersey, New Hampshire, Wisconsin and Illinois the statutes provide that, after final decree the court shall have power to change or modify it in accordance with the changed circumstances of the parties.”

*Andrews v. Andrews*, 15 Iowa 423, and *Jungk v. Jungk*, 5 Iowa 541: Both of these cases are based upon the same statute referred to in *Fisher v. Fisher, supra*. *Bristow v. Bristow*, 21 Ky. Law 481, 51 S. W. 819: In this case the alimony allowed was for the benefit of the wife and a minor child, and, as we have already noted, the jurisdiction in

such cases, as it relates to children, is continuing. The general language found in the opinion will be understood by reading § 2123, Kentucky Statutes.

*Barbaras v. Barbaras*, 88 Minn. 105, 92 N. W. 522: This case is based upon a statute conferring upon the court the power to modify, being § 4809, General Statutes of 1894. *King v. King*, 38 Ohio St. 370: In this case the alimony was *pendente lite*, and the question involved was the power to increase it. *Whitton v. Whitton*, 71 L. J. P. & Adm. 10: This was an action for the purpose of varying a marriage settlement, and was based upon the matrimonial causes act. None of these cases, in our opinion, in any way militate against the rule as we have heretofore stated it applicable to the class of cases we are now considering.

In our examination of the authorities we have found three cases which we deem worthy of special notice. These are *Alexander v. Alexander*, 13 App. Cas. D. C. 334; *Emerson v. Emerson*, 120 Md. 584, 87 Atl. 1033, and *Francis v. Francis*, 192 Mo. App. 710, 179 S. W. 975. In the *Alexander* case, the court seems to have adopted the rule that, where the alimony awarded to the wife is payable in installments, the court has the power to subsequently change it, even though it was allowed in a case where the divorce was absolute and there was no reservation in the decree giving to the party who sought the modification the right to petition the court therefor. In reading the opinion, however, it is plain that the conclusion was induced somewhat by the acts of Congress relating to the District of Columbia. That this is so is indicated by the opinion in *Emerson v. Emerson*, *supra*. In that case Justice Constable, commenting upon the *Alexander* case, said:

“It declared the jurisdictional right of modification existed in virtue of the acts of Congress, which acts are virtually in the language and meaning of our acts.”

No authorities are cited in support of the conclusion reached in the *Alexander* case, in the absence of statute, but



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it is sought to distinguish that case from the cases from Maine, Rhode Island, New York, Ohio, Alabama, and Kansas, and one from its own court, upon the thought that the alimony allowed in most of those cases was in gross and was not alimony in the proper sense of the term; that is to say, the alimony was not payable in periodical installments but was an arrangement of property interests between the parties. It is admitted in the opinion, however, that, in two of the cases sought to be distinguished, the alimony allowed was payable in monthly installments of indefinite continuance. In the course of the opinion the court says, at p. 592:

“It is conceded on the part of the appellant, that upon good cause shown of inability on the part of the husband to pay the alimony, the court might order a suspension of payment, and would not, or rather should not, punish him as for contempt of court. But it seems to us that this concession virtually concedes the whole case. If the decree for the amount of alimony is of the rigid, inflexible, and unchangeable character claimed for it in the bill of review now before us, it is not apparent how it can be suspended any more than it can be modified by a reduction of the amount.”

We are unable to subscribe to this reasoning. It seems to us to confuse the means of enforcing the decree with the power to modify it. In the event the delinquent husband is cited for contempt and it is made to appear that he is unable to pay, the wife is simply deprived of one of the means provided by law for the collection of her alimony. The decree, however, is in no sense modified or suspended, but remains unaltered and in full force, and if the husband should subsequently acquire property or become able to pay, he could be compelled to satisfy the decree according to its precise terms. If an execution is issued upon a judgment in an ordinary action and is returned by the sheriff “no property found,” would it be contended that the judgment had been altered? In the latter, as in the former case, the holder of the judgment is merely deprived of one of the means by which

it may be enforced. It will not do to say that the inability to enforce a judgment or decree either suspends it or works a modification of its provisions.

It is next argued that it is conceded that, if there is a reservation in the decree in favor of the one seeking to have the allowance of alimony changed, he or she may apply to the court at any time for a modification and the court would have authority to make it. Then follows this statement, at page 598:

“And yet it is not quite apparent how the court could have well reserved to itself the authority to modify a decree if that authority was not already vested in it by law.”

In our opinion, this argument overlooks the principle upon which the rule rests, that where the decree contains a reservation, the power to modify exists. By such a reservation the court does not undertake to confer jurisdiction upon itself. It merely reserves the right to exercise the unexhausted portion of jurisdiction which it already has. As we have heretofore pointed out, the reason such decrees are not conclusive as a matter of law is because they do not purport to be conclusive as a matter of fact. We freely confess that many reasons of practical convenience may be urged in favor of the conclusion reached in the *Alexander* case, and these, no doubt, have had their influence in causing the legislatures in most of the states to enact statutes expressly conferring upon the courts the power to alter or modify decrees relating to alimony, but the very existence of such statutes is at least some argument that the courts did not possess the power to modify in all cases prior to the enactment of the statutes. What was the necessity for such statutes if the courts, prior to their enactment, possessed the power to modify their decrees in all cases relating to alimony?

In the *Emerson* case (p. 589), the statute of Maryland provided:

“The courts of equity of this state shall and may hear and determine all causes for alimony in as full and ample man-

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ner as such causes could be heard and determined by the laws of England in the ecclesiastical courts there."

The statute also conferred upon the courts of equity power to grant alimony in all cases where divorces were granted, and there was no definition of alimony in the statute. It was, therefore, concluded that, as the power of the court was like that of the ecclesiastical courts of England, and that such courts had power to modify their decrees relating to alimony, the courts of Maryland likewise possessed that power by virtue of the statute, regardless of the nature of the decree to which the award of alimony was incident, and cited with approval the *Alexander* case with the comment, among others, heretofore quoted.

In the *Francis* case, the supreme court of Missouri recently discussed the question now before us at some length, notwithstanding the decree in that case contained the provision: "Until the further orders of this court," and further that, by § 2375 of the Revised Statutes, 1909, of Missouri, it is provided that, on application of either party, the court may make such alterations in its decrees relating to alimony or maintenance as may be proper at any time. In the course of the opinion, it is said that the case of *Alexander v. Alexander, supra*, was cited approvingly by the supreme court of the United States in *Audubon v. Shufeldt*, 181 U. S. 575. An examination of the *Audubon* case will disclose that the appeal in that case was from the District of Columbia, and the question presented was whether a judgment rendered in the state of Maryland requiring Shufeldt to pay alimony to his divorced wife at the rate of \$50 per month was such a debt as might be discharged in bankruptcy. In commenting upon the law of Maryland and the District of Columbia, it notices, among other cases, the *Alexander* case. In determining the character of the judgment, the supreme court would look to the laws of the jurisdiction in which it was rendered, and the Maryland court has since approved the holding in the *Alexander* case as being based upon statutes

similar to its own. Mr. Justice Gray, in the course of his opinion in the *Audubon* case, said that: "Generally speaking," alimony may be altered at any time as the circumstances of the parties may require. To this statement of the rule we subscribe, but cases of the character we are now considering are very exceptional.

We cannot, without inordinately extending this already too long opinion, undertake to discuss at length the cases from our own jurisdiction. We have endeavored to examine all of them, and our investigation discloses that, whenever a decree has been modified, it has been in a case where the right to modify was expressly reserved in the decree or the rights of children were involved; and in the latter class of cases, this court has said in varying forms of words that, where alimony is awarded for the support of children, the decree is a continuing one and the jurisdiction of both the parties and the subject-matter continues so long as there is a minor child whose welfare and maintenance are provided for in the decree. If the power to modify decrees relating to children terminates when there is no longer a minor child whose welfare and maintenance are provided for in the decree, does it not necessarily follow that, if there had been no minor child, the power to modify would not have existed in the first instance? As the result of our study of the authorities, we are induced to conclude that, where the divorce is from bed and board and the decree provides for the payment of alimony, it may be modified to meet changed conditions, because of the continuance of the status of marriage, and further, because the common law courts have inherent jurisdiction in such cases, the rules of the ecclesiastical courts being a part of the common law; that where the alimony is temporary, it may, of course, be changed during the pendency of the action; where the alimony is for the purpose of providing maintenance for minor children, the decree may be modified so long as there are minor children to be cared for, the duty to support the child springing from the

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parental relation which continues to subsist after the marital status in which it had its origin has terminated; that where the decree contains an express reservation of the power to modify, the court may thereafter exercise the unexhausted portion of its jurisdiction, the judgments in such cases not purporting to be final; where the right to modify is conferred by statute, it clearly exists regardless of whether the decree be one of absolute divorce or mere separation. But that, both upon principle and authority, where the decree grants an absolute divorce and permanent alimony, though payable in installments, is allowed, and there are no minor children to be cared for, and the decree contains no reservation of jurisdiction, and there is no statute conferring the power to modify, after the time for appeal has expired and the time limited by statute within which judgments may be modified has elapsed, and the judgment is not attacked upon the ground of fraud or mistake, there is no power in the court to modify or alter it to meet changed conditions.

The judgment is affirmed.

ELLIS, C. J., MORRIS, and MAIN, JJ., concur.

CHADWICK, J. (concurring)—That the sea of matrimony is “thick and uncertain” with neither chart nor compass to guide the mariner who embarks upon it is well understood. Judge Webster has most ably read the chart which marks the tortuous channels that lie in front of those who divide the life belt and thenceforward drift alone. His opinion is sustained by authority, and as it demonstrates the state of the law, it seems to me that it as clearly demonstrates a necessity for curative legislation. After a marriage has been dissolved by divorce and alimony awarded the one divorcee—it is not regarded as chivalrous to award alimony to the other—there is no reason, except in law, why the parties should not be subject to the call of changed conditions.

The grass widow may marry again, or may prosper upon her own account. In either event, the rejected spouse should be freed of the burden of support. Or the grass widower

may become poor, or again marry, and happily, in which case society should concern itself to see that a tie that is broken between persons intolerable to each other does not become a club of revenge and hate in the hands of the one or a mill stone about the neck of the other.

As I have said, every reason, the dictates of common sense, the interest of society, and the logic of our statutes defining the status of married persons—save the law—call for a different rule.

It might well behoove the legislature of this state to put us in line with other states where the evil to which we are bound by authority has been cured by appropriate legislation.

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[No. 13691. Department Two. June 20, 1917.]

WILLIAM R. CRAWFORD, *Plaintiff*, v. SEATTLE, RENTON &  
SOUTHERN RAILWAY COMPANY *et al.*, *Defendants*.<sup>1</sup>

STREET RAILWAYS—USE OF STREETS—FRANCHISE—RIGHT TO COMPENSATION—EVICTION. Preventing a street railway company from using a street under its franchise during a period in which it was claimed by the city that the franchise had been forfeited, amounts to a partial eviction and suspends the right of the city to collect the two per cent per annum upon the company's gross receipts provided for in the franchise, during the period in question, where the company was thereby put to an expense in excess of the two per cent contracted for; and it is in such case immaterial that the company used other streets under the franchise during the period.

SAME—FRANCHISE—COMPENSATION — DEFENSES — TENDER. Tender of two per cent of the gross receipts of a street railway, made to a city at a time when it was contending that the company's franchise was forfeited, in an effort to induce the city to comply with the franchise contract, is not a waiver of defenses or an admission that the city was entitled thereto, where it was not accepted by the city.

<sup>1</sup>Reported in 165 Pac. 1070.

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Opinion Per PARKER, J.

Appeal from an order of the superior court for King county, Frater, J., entered July 24, 1916, upon findings in favor of the defendants, rejecting a claim in receivership proceedings for franchise rentals due a city from a street railway corporation. Affirmed.

*Hugh M. Caldwell, Walter F. Meier, and George A. Meagher*, for appellant.

*Higgins & Hughes (Hyman Zettler, of counsel)*, for respondents.

PARKER, J.—The city of Seattle filed in the above entitled action its petition for allowance of its claim against the receivers of the Seattle, Renton and Southern Railway Company appointed therein. The city's claim is for \$13,078, being two per cent of the gross receipts of the operation of the lines of the railway company, and is rested upon the provisions of the franchise granted to it by the city. Trial upon the merits in the superior court resulted in findings and judgment denying recovery by the city, from which it has appealed to this court.

During the period here in question, the lines of the railway company were operated by it and its receivers under a franchise granted by the city of Seattle, which contained, among other provisions, the following:

“The grantee, its successors and assigns, shall pay annually to the city of Seattle two per cent per annum of the gross receipts derived from the operation of said railways from and after the date of the acceptance of this franchise until its expiration, . . . Said payments shall be made on the 15th day of January of each and every year for the year preceding. . . .”

Assuming that the railway lines were operated under and in full enjoyment of this franchise without interference by the city authorities, during the period from January 1, 1912, to March 4, 1915, there became due from the company and its receivers to the city the sum of \$13,078, no part of which

has been paid. At the time of granting the franchise, because of the prospective regrading of Dearborn street, over which one of the lines contemplated by the franchise was to be constructed and operated, the railway company was temporarily permitted by the city to maintain a line upon King street, the line upon Dearborn street to be constructed as soon as that street would be regraded. On December 23, 1910, the city passed an ordinance purporting to repeal and forfeit the franchise under which the railway lines were being operated. This repealing ordinance was decreed void and of no effect by the Federal court sitting in Seattle on March 4, 1915, in an action then pending therein wherein the railway company was plaintiff and the city was defendant. Prior thereto the court rendered an opinion in accordance with which the decree was entered, which opinion is reported in *Seattle, Renton & Southern R. Co. v. Seattle*, 216 Fed. at page 694.

At all times in question, there was in force in the city a general ordinance making it unlawful for any person or corporation holding a franchise to use or occupy any public street in the city to perform work upon the streets thereunder without first applying for and procuring a permit therefor from the board of public works. During the period from January 1, 1912, to March 4, 1915, the railway company and its receivers were prevented by the city authorities from constructing any tracks looking to the operation of a line of railway upon Dearborn street, though they had duly made application for permits to proceed with the construction of that line as contemplated by the franchise ordinance, and during all of that period Dearborn street had been regraded and was physically ready for the construction of the railway line thereon. The refusal of the city authorities to allow the railway company or its receivers to so proceed was because of the contention of the city that the railway company's franchise had been forfeited and that it had no right to occupy any of the streets of the city with its railway lines.



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During this period the railway company was compelled to continue to maintain its temporary line upon King street, which, by reason of conditions attending the operation of the line there, resulted in the railway company being under the necessity of expending more than \$1,500 per month in excess of what it would have cost to maintain its lines upon Dearborn street, so that the railway company, during the period of approximately thirty-eight months, incurred an expense of over \$56,000 more than it would have incurred in the operation of a line upon Dearborn street, had it been permitted to do so as its franchise contemplated. In January, 1913, and January, 1914, the receivers of the railway company tendered to the city sums equal to two per cent of the gross receipts derived from the operation of the railway lines for the years 1912 and 1913, respectively. These tenders were refused by the city, they being made at a time when the city was contending that the franchise of the railway company had been forfeited.

It is contended in the city's behalf that neither the railway company nor its receivers should be permitted to avail themselves of the defense of the refusal of the city to permit the construction of the railway line on Dearborn street, because there was not sufficient showing that the railway company or its receivers were ready, willing and able to construct that line. This contention, we think, is wholly without merit. As well said by counsel for the receivers, the city "is seeking to recover on a contract when it admits that it was not only unwilling to perform its part of the contract but positively refused to do so." Even if it were necessary for the receivers to affirmatively show willingness and ability on the part of the railway company and on their part to build the line on Dearborn street, the record, we think, makes sufficient *prima facie* showing in that regard. It is possible that, in the latter part of the period in question when the receivership was about to be wound up, it might then not have been practical for the receivers to proceed with the construction

of the line on Dearborn street. But even if this be true, we think the city is not in a position to now take advantage of that fact. Indeed, the amount of loss resulting to the railway company and the receivers because of being compelled to operate the line on King street instead of Dearborn street argues that the city was in no small degree responsible for whatever lack of ability there may have been on the part of the receivers to construct the line upon Dearborn street during the latter part of the period in question.

It is contended by counsel for the city that the continued operation of the King street and other lines of the railway system was such an enjoyment of the franchise that the railway company and its receivers should not be permitted to resist payment of the city's claim upon the ground of being prevented from enjoying the use of Dearborn street. We think this contention is answered in substance by the decision of the supreme court of Missouri in *National Subway Co. v. St. Louis*, 169 Mo. 319, 69 S. W. 290. The city had granted franchise rights to the subway company to construct and operate electric conduits in the streets, the company being obligated, as one of the conditions of the franchise, to pay the city certain sums semi-annually. The city authorities becoming of the opinion that the franchise ordinance was void, sought to revoke it and denied the company the right to occupy the streets thereunder. The validity of the franchise having been established in the courts, the city sought to collect the semi-annual installments from the company during the whole life of the franchise, including the period when the company had been deprived of its rights thereunder. Denying the claimed right of the city to collect the semi-annual installments for the period when the company's full enjoyment of its franchise was prevented by the city, Justice Marshall, speaking for the court, observed:

"The city had the power to make the grant, and to prescribe the terms of the grant. The result attained was the right to so use the streets by the plaintiff, and the right of

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the city to exact the semi-annual payments for the exercise of the right granted. The rights and duties of the parties were therefore mutual and interdependent. The city had no right to the money except as compensation for the enjoyment and exercise of the right granted, and the plaintiff was bound to pay only in case it was allowed to exercise and enjoy the right granted. The plaintiff could not, of course, avoid payment by a voluntary nonuser of the right, nor could the city deny the right and still insist upon compensation for the exercise of the right denied. Such a position would be inconsistent and unconscionable."

After making some further observations likening the position of the company to that of a tenant of the city, Justice Marshall concluded the opinion as follows:

"The city is the landlord and the plaintiff is the tenant. The tenant's quiet enjoyment was interrupted and its possession taken away by the landlord, and therefore its obligation to pay the rent ceased while and as long as such eviction lasted, but sprung into existence again as soon as the enjoyment was restored. Hence, the city had no right to demand or exact the semi-annual payments during the time the city prevented the plaintiff from enjoying the rights conferred by the ordinances."

That case is exactly like this except that there was apparently an entire prevention of enjoyment of the franchise in that case, while in this case the prevention of enjoyment of the franchise was only partial. That an eviction of some substantial part of leased premises suspends the right of the landlord to collect rent, even though the tenant remains in possession of other portions of the premises, is well settled by the authorities. In *Smith v. McEnany*, 170 Mass. 26, 48 N. E. 781, 64 Am. St. 272, the subject was reviewed by Justice Holmes, now of the supreme court of the United States, where he said:

"It is settled in this state, in accordance with the law of England, that a wrongful eviction of the tenant by the landlord from a part of the premises suspends the rent under the lease. The main reason which is given for the decisions is,

that the enjoyment of the whole consideration is the foundation of the debt and the condition of the covenant, and that the obligation to pay cannot be apportioned."

In *New York Drygoods Store v. Pabst Brewing Co.*, 112 Fed. 381, Judge Baker, speaking for the seventh Federal circuit court of appeals touching the question of partial eviction as affecting the landlord's right to collect rent, said:

"It is universally agreed by the authorities that the wrongful eviction or ouster of the tenant by the landlord from an appreciable, material, or substantial part of the demised premises suspends the rent reserved under the lease, and will defeat the landlord's right to recover the same. The main reason which is given for the decisions is that the enjoyment of the whole consideration is the foundation of the debt and the condition of the covenant, and that the obligation to pay cannot be apportioned. To permit an apportionment of the rent would be to allow the landlord to take advantage of his own wrong."

It seems quite plain to us that the depriving of the railway company and its receivers of the use of Dearborn street, as provided in the franchise, amounted to a partial eviction and suspended the right of the city to collect the two per cent of the gross income from the operation of the railway during the period in question.

It is further contended in behalf of the city that the tender of payments made by the receivers of two per cent of the gross income which accrued for the years 1912 and 1913 was in effect a waiver of the defense which the receivers here make against the city's claims. We think it is a sufficient answer that those tenders were not accepted. They were made at a time when the city was insisting in the Federal court that the franchise had been forfeited, and manifestly were made by the receivers in an effort to induce the city to comply with the franchise contract and permit the receivers to proceed thereunder, as well as to prevent the possibility of forfeiture of the franchise, then in litigation in

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the Federal court. We are quite unable to understand how the city can now have these tenders construed as an admission on the part of the receivers that the city was legally entitled thereto. If there has been any payment and acceptance of the two per cent of the income accruing after March 4, 1915, it seems plain that whatever effect such payments might have as an admission that the city was entitled thereto, they could in no event have the effect of an admission that the city was entitled to any payments accruing prior thereto during the period that the railway company and the receivers were deprived of the use of Dearborn street; in other words, during the period when they were in effect partially evicted. *Morris v. Kettle*, 57 N. J. Law 218, 30 Atl. 879; *Kuschinsky v. Flanigan*, 170 Mich. 245, 136 N. W. 362, Ann. Cas. 1914A 1228, 41 L. R. A. (N. S.) 430.

We are clearly of the opinion that the city is not entitled to recover. The judgment is affirmed.

ELLIS, C. J., MOUNT, FULLERTON, and HOLCOMB, JJ.,  
concur.

[No. 13772. Department Two. June 20, 1917.]

**B. S. FRYAR, *Appellant*, v. HAZELWOOD HOLSTEIN FARMS  
*et al.*, *Respondents*.<sup>1</sup>**

**SALES—WARRANTY—PROMISE.** A statement that a certificate would be furnished showing that an animal sold had been tuberculin tested is not a misrepresentation of a fact, but a promise, and does not amount to a breach of warranty.

**RECEIVERS — SALES — MISREPRESENTATIONS — LIABILITY—REMEDIES.** Under the rule of *caveat emptor*, misrepresentations of fact by a receiver or his agent at a receiver's sale give no cause of action against the receiver as such, the remedy being against the receiver personally or by timely rescission.

**CORPORATIONS—REPRESENTATIONS—OFFICERS—POWERS — REPRESENTATIVES AT RECEIVER'S SALE.** A corporation is not liable for misrepresentations made by an officer or trustee of the corporation at a receiver's sale of live stock in *custodia legis*, since he had no authority to do anything in connection with the sale.

**RECEIVERS—APPOINTMENT—COLLATERAL ATTACK.** A sale by a statutory receiver, appointed by the court under Rem. Code, § 740, to manage and dispose of property during the pendency of an action or proceeding as an officer of the court, cannot be impeached by evidence that the corporation was not insolvent and that the receiver was only an agent appointed by consent to settle differences between the parties to the action.

**RECEIVERS—SALES—NOTICE—LIABILITY BY CORPORATION.** A receiver conducting a sale that had been previously advertised by the corporation is not required to give notice that it was a receiver's sale; and the corporation would not be liable for any fault or omission by the receiver.

**COSTS—WITNESS FEES—MILEAGE.** Allowance of more mileage fees to witnesses than they had reported to the clerk is without prejudice, where they were allowed no more than they actually traveled.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered February 19, 1916, upon granting a nonsuit, dismissing an action for breach of warranty. Affirmed.

<sup>1</sup>Reported in 165 Pac. 1084.

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Opinion Per HOLCOMB, J.

*Patrick C. Shine and H. G. & Dix H. Rowland*, for appellant.

*Voorhees & Canfield and Cullen, Lee & Matthews*, for respondents.

HOLCOMB, J.—Appellant sued to recover damages for an alleged breach of warranties made at a receiver's sale. The evidence introduced by appellant tended to show that the Hazelwood Holstein Farms, Incorporated, one of respondents herein, by its trustees, Smith and Mills, advertised that a certain sale of blooded Holstein cattle would be held in Spokane during the interstate fair. Subsequent to these advertisements but prior to the sale, one Lee was appointed by the court as receiver of the Hazelwood Holstein Farms, Incorporated, and the sale was actually conducted by him in that capacity. At the sale, the auctioneer stated that all the cattle to be sold were registered and that purchasers would be furnished with registration and transfer papers. Smith also stated that the cattle offered for sale had recently been tuberculin tested, and that purchasers would be furnished with health certificates showing that such test had been made and that the cattle were free from tuberculosis. Appellant attended this sale, having no notice, as he claimed, that it was by a receiver, heard the representations so made, and purchased a young heifer for \$539, and a bull calf for which he paid \$85. Shortly afterwards the heifer died from tuberculosis, according to the statement of a veterinary who attended the heifer during her sickness. It also appears that the bull calf was not registered at the time of the sale, but his breeding was such that he was entitled to registration, and he was registered and the papers evidencing that fact were furnished appellant subsequent to the commencement of this action. Appellant then instituted this action against respondents Hazelwood Holstein Farms, Incorporated, and Lee as receiver, and alleged that, by reason of the failure of respondents to deliver the registration papers and health

certificates, he had been greatly damaged, in that he had sold these cattle at an increased price but was unable to make good on his representations to the purchasers, and that, in the case of the bull calf, he incurred a large damage by reason of being obliged to purchase his progeny from the party to whom he was sold, since he had been bred to a number of thoroughbred cows; and further alleged that the animals, without the registration and health certificates, were worth only \$190, and with them they were worth \$1,000. At the conclusion of appellant's testimony, the lower court sustained a challenge to the sufficiency of the evidence and directed a judgment of dismissal. From this disposition of the case, appellant has appealed.

From an examination of the facts, it is noticed that the only misrepresentation made was that the bull calf was registered. There was no evidence showing that the animals had not been tuberculin tested, and the statement that a certificate showing such test would be given to the purchaser is not a misrepresentation of a fact, but a promise to do something in the future.

In determining the legal principles involved in this appeal the liability of the receiver will first be considered. It is not seriously disputed that a receiver's sale is a judicial sale and that, in such cases, the doctrine *caveat emptor* applies. Since the sale is made under the direction of the court, there is no warranty. But where there is fraud or misrepresentation of fact made by the receiver or by his agents, as in this case, *caveat emptor* is not applicable, and the problem thus presented is whether the receiver has such authority in making warranties at a sale that he is liable to respond in damages, as receiver, for a breach of such warranties.

The authorities are harmonious in declaring that the receiver has no authority to make warranties as to either the title or quality of goods sold at a receiver's sale, as the receiver is simply an officer or agent of the court and all the



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authority in him vested is simply what is derived from the court, which is only to sell the goods; and because there is no warranty by the court, there is nothing to go back on if the buyer takes nothing. Rorer, *Judicial Sales* (2d ed), § 174; *The Monte Allegre*, 9 Wheat. 616; *Horner v. Continental & Commercial Trust & Sav. Bank*, 198 Fed. 832. Where misrepresentations of fact are made by the receiver or his agent and they are relied on by the purchaser to his damage, this rule does not preclude the purchaser from any relief whatever, for in such cases the authorities are equally well settled that there are two courses that the purchaser may pursue: (1) He may sue the receiver in his personal capacity, as the warranty binds him personally and him only; (2) he may seek a timely rescission of the contract of sale. Rorer, *Judicial Sales*, 174, 175; *Horner v. Continental & Commercial Trust & Sav. Bank*, *supra*. In the case at bar, appellant pursued neither of these courses, but elected to sue the corporation and its receiver for damages. No cases are cited by appellant, nor are we able to discover any, that hold that such an action can be successfully waged against the receiver.

It is then urged by appellant that respondent corporation is liable on account of the misrepresentations made by Smith, and cite *Scott v. Rainier Power & R. Co.*, 13 Wash. 108, 42 Pac. 531, to show that a company may be sued after a receiver has been appointed. Granting that this is true, a valid cause of action must arise before a cause of action can be maintained against a corporation for which a receiver has been appointed; and it is apparent that, if Smith made representations that a certificate evidencing the facts represented would be furnished the purchaser, he acted either as agent of the receiver or as trustee and manager of the respondent corporation. Obviously, if he acted as agent of the receiver, he had not sufficient authority to make warranties that would be binding on any one, as the receiver himself had no such authority. Neither do we think he had sufficient

power or authority by reason of his office in the corporation as trustee to bind the respondent corporation by his warranties made at receiver's sale, for the officers of the corporation have no authority to do anything in connection with the sale, since it is in the exclusive jurisdiction of the court. It was a sale of property *in custodia legis*. For example, in the order the court might authorize the sale on certain terms or conditions. It could not be seriously contended that the officers of the corporation could, by statements made at the sale, change the terms and conditions prescribed by the court. Whether Smith would be personally liable by reason of his statements made at the sale need not be considered, as he was not made a party to the action.

During the progress of the trial, appellant offered to prove that the corporation was not insolvent, and that the only purpose of the receivership proceedings was to settle some property differences between Smith and Mills. This evidence was rejected by the trial court, and his action in so doing is now assigned as error. Appellant argues that, if this evidence had been admitted, it would show that the receiver was only an agent of the parties and not an officer of the court, and therefore the rule that a receiver has no authority to make warranties at a sale is not applicable, as such rule is based on the premise that he is an officer of the court and is vested with only such authority as he derived therefrom. In support of this theory appellant cites *Kellar v. Williams*, 3 Rob. (La.) 321, wherein it is held that, where it appears that a receiver was appointed with the consent of the parties for the purpose of adjusting property differences, the receiver will be deemed to be the agent of the parties, strictly speaking, and not an officer of the court. It does not appear that the receiver therein was appointed by virtue of a statute, and it does show that he was appointed by consent of the parties. In the case at bar, we find no offer to prove that respondent Lee was appointed by consent of the parties, and, in any event, he was presumptively appointed by a court

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of competent jurisdiction by virtue of Rem. Code, § 740, which defines a receiver as follows:

“A receiver is a person appointed by a court or judicial officer to take charge of property during the pendency of a civil action or proceeding, or upon a judgment, decree, or order therein, and to manage and dispose of it as the court or officer may direct.”

Respondent Lee was, therefore, a statutory receiver and an officer of the court, no matter for what purpose he was appointed, and the court properly rejected the evidence tending to show such purpose.

It is immaterial that appellant was not notified at the sale that it was being conducted by a receiver. There is no statute requiring proclamation of such fact by a receiver, and no order to that effect is shown. The receiver presumably proceeded in accordance with his order. The receiver is not sought to be held liable in his personal capacity. The corporation could not be held liable for any fault or omission of the receiver.

Complaint is also made that the costs were taxed too high, in that more mileage was allowed certain witnesses than they had reported to the clerk. Since it is not contended that these witnesses were allowed costs for more mileage than they actually traveled, we think this argument without merit, as the clerk has power to correct his original notation of mileage if it was in fact too high or too low.

Judgment affirmed.

ELLIS, C. J., MOUNT, FULLERTON, and PARKER, JJ.,  
concur.

[No. 13853. Department Two. June 20, 1917.]

**I. C. PARKER, as Administrator etc., et al., Respondents, v. SEATTLE LAND & IMPROVEMENT COMPANY, Appellant.<sup>1</sup>**

**BROKERS — CONTRACTS — PERFORMANCE — EVIDENCE—SUFFICIENCY.** Findings that a broker was authorized to sell lots for \$9,500, which was but \$100 less than the price authorized by the contract, are sustained where a witness testified that such authority was given in consideration of the broker's agreement to make up the \$100 on sales of other lots, which was done, and the testimony of the plaintiffs to the effect that they demanded \$10,000, which was \$400 more than the contract gave them, and that the broker agreed to throw off \$500 in commissions, was highly improbable.

**SAME.** The claim of owners that a broker attempted to deceive them by representing that a sale of lands to a city for a park was made for \$25,000 instead of \$30,000 received, and that \$5,000 was unlawfully retained, is not sustained, where the sale was public and a matter of notoriety, the price was paid by city warrant to the president of the broker, a man possessed of the trust and confidence of the business world, who testified that the \$5,000 was retained under an express agreement to be accounted for at the expiration of the contract, under which commissions had then been earned on sales amounting to \$40,000.

**SAME—COMMISSIONS—DEDUCTION FROM PAYMENTS.** Where a broker was to receive commissions when the aggregate sales amounted to \$40,000, it was not required to pay over the money on the last sale, but could deduct its commissions and pay over the balance due.

**SAME—CONTRACT FOR COMMISSIONS—RIGHT TO TERMINATE.** A repudiation of a broker's contract is not warranted because of the broker's refusal, on demand for an accounting, to accede to the owners' demands, where there was a *bona fide* dispute as to the amount due and no settlement could be reached.

**SAME—RIGHT TO COMMISSIONS—TIMELY PERFORMANCE—TENDER.** A broker procures a purchaser able and willing to take the property and is entitled to its commissions, where, upon the owners' refusal to execute a deed with an unauthorized condition as to payment, it procured the full cash price and tendered the money within the time limit of the contract and demanded a deed in the name of the purchaser which tender and demand the owners refused.

**SAME—PERFORMANCE—TENDER—SUFFICIENCY.** Where the owners, within the limit of a broker's contract, refused a tender of the full

<sup>1</sup>Reported in 165 Pac. 1086.

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cash price, the broker earned its commissions and is not required to keep the tender good by a deposit, since the owners' failure to accept the tender within a reasonable time makes the default their own.

**SAME.** Under a contract, authorizing a broker to sell lots at fixed prices, which it was to collect and account for, in order to entitle the broker to a performance, it was not necessary to tender in excess of the contract price.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered July 28, 1916, upon findings in favor of the plaintiffs, in an action for an accounting, tried to the court. Reversed.

*Kerr & McCord*, for appellant.

*Halverstadt & Clarke*, for respondents.

**FULLERTON, J.**—This is an action for an accounting. It was originally brought by Isaac Parker and Lydia G. Parker, his wife, against the Seattle Land & Improvement Company. After the issues had been framed and the evidence in the case taken, and while the trial court held the cause under advisement, Isaac Parker died, and I. C. Parker, the administrator of his estate, was substituted as a party plaintiff in his stead. This appeal is by the defendant, the Seattle Land & Improvement Company, and for convenience we shall refer to the parties as appellant and respondents as though no substitution had been made.

The facts giving rise to the controversy are in the main undisputed. On August 30, 1908, and for some years prior thereto, the respondents were the owners of a tract of land, ten acres in area, situated in that part of the city of Seattle formerly comprising the city of Ballard, which they had caused to be platted under the designation of Parker's addition to the city of Seattle. The appellant is a corporation engaged in the general real estate and brokerage business. On the date named, the parties entered into a written contract by which the appellant undertook to sell for the re-

spondents the real property mentioned, the material parts of the contract being as follows:

“(1) The first parties hereby give and grant to the company until August 20th, 1910, the sole and exclusive right to sell for them the following real estate, lying and being in King county, Washington, to-wit: Parker's Addition to the City of Seattle.

“(2) The company may sell said real estate, or any part thereof, for cash or on deferred payments, but no lot in block one (1) of said addition shall be sold for less than the sum of \$300; no lot in blocks two (2) and three (3) of said addition shall be sold for less than the sum of \$600; and no lot in block four (4) of said addition shall be sold for less than the sum of \$300. No lot in said addition shall be sold on deferred payments for less than one hundred dollars (\$100) cash upon execution and delivery of contract of sale therefor, and ten dollars (\$10) monthly thereafter until the full purchase price thereof shall be paid, with interest on deferred payments at the rate of seven (7) per cent per annum, interest payable monthly. Should more than one lot be sold on the same contract, the same cash and monthly payment shall be required for each lot so sold.

“(3) The company shall advance to the first parties the sum of ten thousand dollars (\$10,000), without interest, payable as follows: five hundred dollars (\$500) cash upon the execution and delivery of this agreement, the receipt whereof is hereby acknowledged, and nine thousand five hundred dollars (\$9,500) within ——— days after date hereof. Said sum shall be retained by the company out of the first moneys received by it hereunder.

“(4) The first parties shall secure, at their own expense, and furnish to the company, one abstract of title to said real estate, certified to by some responsible abstract company doing business in the city of Seattle. The company shall, at its own cost, furnish such additional abstracts of title to said real estate as may be necessary.

“(5) The first parties shall execute and deliver to purchasers of said property deeds thereto when the purchase price thereof has been fully paid. They shall also execute and deliver to purchasers of said property sold on deferred payments contracts of sale therefor as the same is sold, but all such deeds and contracts shall be subject to taxes and assess-

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ments for local improvements which may become payable, or a lien on said property subsequent to date hereof.

“(6) The company shall hold the first parties and said property harmless from any and all taxes and assessments on said property which shall become a lien on the same, or payable, subsequent to date hereof and prior to full payment for said property.

“(7) All deferred payments shall be collected by the company and it shall account to the first parties on the first day of each and every month hereafter, in detail, for all sales and collections made by it during the preceding month.

“(8) The company shall receive as and for its full compensation for services rendered hereunder, and in full payment for any disbursements made by it hereunder, the following: Five per cent (5%) of the first ten thousand dollars (\$10,000) of the aggregate sale price of said property; two and one-half per cent (2½%) of the balance of the aggregate sale price of said property up to forty thousand dollars (\$40,000); and one-half (½) of the gross aggregate sale price of said property over forty thousand dollars (\$40,000). No part of said commission or compensation shall be due or payable until the company shall have sold in the aggregate property to the extent of forty thousand dollars (\$40,000), and shall be payable only out of moneys thereafter coming into its possession hereunder.”

Acting under and in pursuance of the contract, the appellant found purchasers to whom deeds were issued by the respondents for all of the property, save and except eleven lots in block one and one lot in block four. Of the property so sold, sixteen lots were sold to a school district of King county for the sum of \$9,500, forty-eight lots to the city of Seattle for the sum of \$30,000, and the remainder to individual purchasers, the total of such individual sales aggregating \$2,550.

The present action was begun after the time limit for selling the property fixed in the contract had expired. In their complaint the respondents alleged that the total sales aggregated the sum of \$42,050; that the appellant had suffered taxes and assessments to accumulate on the unsold property in

the sum of \$837.47; that it had received \$5,000 of the purchase money for which it had not accounted; that it had waived its commission on the first \$10,000; that it was entitled to commissions on the remaining sales aggregating \$1,775, and that there was due the respondents the sum of \$4,037.47, with interest at the legal rate on \$3,200 thereof from May 20, 1909, and interest on \$837.47 thereof from the date of the commencement of the action. The appellant put in issue by denials the allegation that it had waived a part of its commission, and the allegations of the account as stated by the respondents. By way of an affirmative answer, it alleged a sale of all of the property in accordance with the terms of the contract, the sales aggregating \$45,650, on which it was entitled to a commission of \$4,075; and that it had paid, after deducting the commissions, all that remained due the respondents, except a balance of \$422, which it tendered and paid into the registry of the court for the use of the respondents. The sales included a sale alleged to have been made to one Isabella Whyte of the twelve lots for which the respondents refused to issue a deed. For reply the respondents denied the affirmative allegations of the answer, and as a special defense to the allegation concerning the sale to Isabella Whyte, alleged that the appellant had, prior to such alleged sale, refused to account for moneys received by it from sales then made, and that the respondents had notified the appellant that they would not proceed further under the contract.

The cause was tried and submitted to the court on March 12, 1914. The court rendered its decision on June 28, 1916. The third finding of fact embodies the substance of the findings, and reads as follows:

“That at the time of signing said agreement, the defendant paid to the plaintiffs the sum of \$500, but no more; that thereafter, during the time of said contract, the defendant sold all of said real estate, mentioned and described in said agreement, except lots one to eleven (1 to 11), both inclusive, block one, and lots one and two (1 and 2) block four (4) of



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said Parker's addition to the city of Seattle, for the sum of \$42,050. That the last sale of said property was made on the 20th day of May, 1909. That defendant earned as its commission, according to the terms of said agreement, the sum of \$2,275. That defendant received on account of the sales of said real estate the sum of \$42,050, and has paid to the plaintiffs the sum of \$37,050, and no more. That on the 20th day of August, 1910, the date of the expiration of said agreement, there were general taxes upon the portion of said Parker's addition not sold by the defendant, to wit: lots one and two, block four, and lots one to eleven, both inclusive, block one, amounting to \$50.69, and assessments for local improvements levied by the city of Seattle amounting to \$456.85, no part of which the defendant has paid."

From the findings the court concluded that the respondents were entitled to recover from the appellant \$2,225, with interest from May 20, 1909, and the sum of \$507.54, with interest from August 20, 1910, together with the costs of the action, and rendered judgment accordingly.

The evidence developed three principal controversies; (1) whether the appellant had waived its commission on the first \$10,000 of the sales; (2) whether it had wrongfully refused to account for the moneys received from the sales; and (3) whether respondents were in the wrong in refusing to recognize the sale made to Isabella Whyte. The first controversy arose out of the sale of the tract to the school district. The respondents testified that they wanted \$10,000 for the lots comprised in this tract; that the school district offered and would pay but \$9,500, and that they consented to the sale on the promise of the appellant that it would waive its commission which would equal the difference, namely \$500. The president of the appellant, who had charge of the negotiations, one Fred E. Sander, denies these statements. He points out that the respondents had no right to exact \$10,000 for the lots as a condition to making a deed thereto; that, by the terms of the contract, the appellant had the right to sell them for \$9,600, and that the price for which they were sold was but \$100 less than the contract price. His version of

the matter is that the respondents consented to make the deed for the price at which they were sold, on his promise to make up the difference of \$100 on subsequent sales, which difference was made up by the subsequent sale to the city of Seattle, that sale being for \$1,200 in excess of the price of the lots as listed in the contract. We are constrained to adopt the appellant's view of the matter. It could have compelled a deed to the property by paying the difference between the price for which the land was sold and the price at which, by the terms of the contract, it was at liberty to sell it. Since its interest in the matter was the commissions it was to receive, it is highly improbable that it would have sacrificed \$400 for the sake of saving \$100.

The second controversy is material here only as it affects the third. If the appellant did wrongfully refuse to account for all of the money received from the sales as made, it may be that the respondents were justified in refusing to recognize the last of the sales made by the appellant. The controversy arises out of the sale to the city of Seattle. This was the last of the sales made for which deeds or contracts were executed. On its completion, the appellant retained from the purchase price received the sum of \$5,000. Mr. Sander testified that the sum was retained under an express understanding and agreement with Isaac Parker, to be accounted for on the expiration of the terms of the contract. The respondents denied the agreement, testifying that the appellant undertook to deceive them; that it was first contended by Mr. Sander that \$25,000 was the sum received for the property, and that he afterwards admitted that the sale was for \$30,000, but claimed that the \$5,000 had to be used for the purpose of consummating the sale, some of it being used to bribe certain of the officials representing the city. It seems to us that, measured by probabilities, the appellant's version of the transaction is the more rational and believable of the two. The city purchased the property for use as a park. In the transaction, it was represented by its park board. The purchase was

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a matter of public notoriety. The title to the property had to be approved by the corporation counsel. The purchase price was paid by a warrant drawn on the city treasury. The park board was composed of men of the highest reputation for probity and integrity. Seemingly, in the light of these facts, no one would have supposed for a single instant that the densest ignorance could be imposed upon by so wild a tale. The record shows that the president of the appellant was possessed of such trust and confidence in the business world as to enable him to borrow on behalf of his company a large sum of money. Characters are not formed in a day, and it is almost beyond belief that a man having a reputation for integrity of this sort would even have attempted to deceive, much less is it believable that he would have attempted to deceive by false representations concerning matters the truth of which, if not already known, could have been ascertained with so little difficulty.

Again, it is not quite fair to assert that the appellant refused to account. This particular sale brought the aggregate sales of the property to a sum in excess of \$40,000. By the terms of the contract (par. 8), the appellant was then entitled to collect for commissions. Nothing in the contract required it to pay the money over and then receive it back from the respondents. It was sufficient for it to pay the difference after deducting the earned commissions. This it offered to do, but when the account was attempted to be taken, the parties could not agree upon the amount due because of the differences concerning the commissions on the first sale, and no settlement could be reached. This, however, does not amount to a refusal to account. The dispute was not whimsical but was in good faith, and the fact that the appellant did not accede to the respondents' contentions could not be said to be a refusal to account, or to authorize the respondents to repudiate the contract.

As to the third contention, the evidence leaves no doubt in our minds that the appellant procured a purchaser for the

remaining property. After procuring the purchaser, it prepared a contract of sale in the form of a time sale authorized by the contract and tendered it to the respondents for execution. The respondents refused to execute it, assigning two reasons, first, that the contract was at an end because of the appellant's refusal to account for the money received by it; and second, because the contract as prepared contained a clause requiring the execution of deeds to single lots when payments equaled a certain sum; a clause not warranted by the contract under which the appellant was empowered to sell. Later, and on the day before the contract expired by its own limitation, the appellant procured the cash price of the property, went to the home of the respondents, where the business of the parties had been usually transacted, and finding Lydia Parker alone in the house, tendered to her the full cash price of the property according to the prices fixed in the contract, and demanded a deed to its purchaser, subject to the taxes and assessments then due thereon. It accompanied its tender also with the sum it admitted to be due on sales theretofore made after deducting its earned commissions. Mrs. Parker refused to accept the money and the matter then rested. The first tender was properly refused for the second reason given for the refusal, but clearly the second tender was a valid tender timely made. Undoubtedly, had the respondents accepted the tender, they would have been entitled to a reasonable time in which to prepare, execute, and deliver a deed, and it may be that equity would have relieved them of their default had they, within a reasonable time, tendered a deed on consideration of receiving the money which had been tendered. But they did neither, and under the contract the appellant became entitled to its commissions on the sale; it produced a purchaser ready, able, and willing to take the property according to the terms on which it had the property for sale.

The respondents argue in this connection that the tender became inoperative because not kept good. We do not know

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that we fully understand the purport of this. If it be meant that the appellant should have paid the money into the registry of the court on filing its answer, or should have deposited it in some public depository, such as a bank, for the respondents' use, we cannot agree with the contention. On the refusal of the respondents to accept the tender when made, the default was theirs. As we have said, since they had a reasonable time in which to execute a deed, equity might have relieved them from the default had they tendered the deed within a reasonable time after refusing the tender; but their failure to either accept at the time of the tender, or within a reasonable time thereafter, made the default their own and relieved the appellant of any further duty.

It is said that the purchaser was not produced within the meaning of the rule laid down in *Barnes v. German Savings & Loan Society*, 21 Wash. 448, 58 Pac. 569. But, if we have correctly caught the drift of the contention, all that the appellant failed to do was to bring its purchaser bodily into the presence of the respondents. This it was not required to do in order to comply with its contract, and we cannot regard the case cited as so holding. It was enough when it brought and tendered to the respondents its purchaser's money and demanded a deed in the name of the purchaser.

There is a dispute in the evidence as to the amount of cash actually tendered to Mrs. Parker on account of the sale to Isabella Whyte. It is conceded that the court was in error in its finding that two lots in block four remained unsold, and that the correct finding should have been that only one lot in that block remained unsold. These lots were priced in the contract at \$300 each. The purchase price was, therefore, \$3,600, and the testimony of Mr. Sander was that he tendered \$3,972, the amount in excess of the purchase price of the lots being the amount he conceded the appellant had collected and not accounted for. Mrs. Parker, on her cross-examination, testified that she told her husband and son that the amount tendered was \$3,972, but later on, in her direct examination,

she testified that Mr. Sander told her the amount was \$5,000; that the money was not counted out. As we view the record, there was no necessity for a tender in excess of the contract price of the lots to entitle the appellant to a performance, and as either amount is in excess of that sum, the exact amount tendered is not necessary to be determined.

The respondents offered no testimony as to the amount the appellant had actually paid of the moneys received by it on the purchase price of the lots. Mr. Sander testified that the sum was \$37,453. In addition to this he claimed a credit of \$100, due from a Mr. Olson to the respondents on the purchase price of a lot sold under contract which had not then been paid. Adding to these credits the amount due the appellant as commissions, and deducting the aggregate from the amount received from the sales, would leave a balance of \$422, the amount the appellant paid into the registry of the court. While the evidence is not very clear as to the \$100 item, it seems to have been conceded elsewhere in the record by both parties that the sum of \$2,550, received from the sales to the individual purchasers, was the aggregate total of the sales. If this be the fact, the item was included in that total, and could not be charged as an additional credit merely because the sum had not been actually paid over. As the record stands, we think the item should not be allowed.

As we view the record, therefore, the respondents were entitled to a judgment against the appellant for the sum of \$522, with the costs and disbursements of the action, on which should be credited the sum paid into court for their use. The judgment is reversed, and the cause remanded with instructions to enter a judgment accordingly. The appellant will recover its costs in this court.

ELLIS, C. J., MOUNT, HOLCOMB, and PARKER, JJ., concur.

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[No. 13874. Department Two. June 20, 1917.]

JAHN & COMPANY, *Respondent*, v. A. F. McCLAINE *et al.*,  
*Appellants*.<sup>1</sup>

**SALES—CONTRACT—OFFER AND ACCEPTANCE.** Under the rule that an unconditional order and unconditional acceptance must be found in a contract evidenced by correspondence, there was a sale of but one car load of hay, where plaintiff by letter ordered one car with "an option on 200 ton additional at same price after first car is unloaded," followed by a proposal to increase the order to 400 tons if the hay turns out satisfactorily, and asking the sellers when the first car would be shipped, and to confirm the 200 tons by return mail, to which the sellers replied giving the approximate date of first shipment, and stating that they would ship the 200 tons as fast as they could get it out, following which no shipment was made of the first car.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered August 28, 1916, in favor of the plaintiff, after a trial upon an agreed statement of facts, in an action on contract. Reversed.

*Oscar Cain*, for appellants.

*McWilliams, Weller & Brown* and *Beechler & Batchelor*, for respondent.

FULLERTON, J.—The plaintiff, W. F. Jahn & Company, brought this action against A. F. McClaine and A. F. McClaine, Jr., alleging a breach of a contract for the sale of a quantity of hay. The cause was submitted to the court upon an agreed statement of facts, the material parts of which are contained in the following letters:

"Seattle, Wash., Jan. 8, 1916.

"A. F. McClaine.

"Please ship one car Montana timothy at \$18 per ton f. o. b. Seattle, settlement to be on Wash. State weight grades.

<sup>1</sup>Reported in 165 Pac. 1060.

W. F. Jahn & Co. to have an option of 200 ton additional at same price after first car is unloaded.

“W. F. Jahn & Company,  
“Per W. F. Jahn.”

“Mr. A. F. McClaine, Jr. Jan. 12, 1916.

“503 Spokane & Eastern Trust Bldg.,  
“Spokane, Wash.

“Dear Sir: Referring to the order we gave you on Jan. 8th, kindly advise how soon we may expect the first carload. If the hay turns out satisfactory we would like to increase our order so as to take on the 400 ton you have to offer. In any event, please confirm the 200 ton by return mail, and oblige.

“Yours truly, W. F. Jahn & Company.”

“Spokane, Washington, January 13th, 1916.

“W. F. Jahn & Company,  
“Seattle, Washington.

“Gentlemen: Your letter of the 12th at hand, and would say that we hope to make shipment on the first car of hay to you on January 20th or 21st. The shipping point of this hay, Marion, Montana, has very poor train service, and freight only leaves there one day per week, although I am trying to perfect some arrangements with the railroad whereby hay will go out oftener from there.

“We will ship two hundred tons to you just as fast as we can get it out, but the balance is already contracted for by another firm, so cannot accept any increase in your order.

“Trusting that the hay will prove satisfactory in every way, I am

Very respectfully,

“A. F. McClaine,  
“Per A. F. McClaine, Jr.”

“Seattle, Washington, Feb. 8, 1916.

“Mr. A. F. McClaine, Jr.,  
“Spokane & Eastern Trust Bldg.,  
“Spokane, Wash.

“Dear Sir: Kindly advise when we may expect some hay on the 200 ton contract we have with you and oblige.

“Yours Truly, W. F. Jahn & Company,  
“W. F. Jahn.”

The court found that the correspondence between the parties amounted to a contract to furnish two hundred tons of



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hay, and gave judgment for plaintiff in the sum of \$900. The defendants appeal.

The sole question for consideration is how far, if at all, this correspondence constituted a contract of sale. It is plain, we think, that it constituted a contract for one carload of hay only. As to one carload, there was plainly a definite proposal and a definite acceptance, and this, under all of the authorities, constitutes such a contract as to entitle a recovery in damages by the one party against the other who is guilty of its breach.

Although the question is not entirely free from doubt, we think that, beyond the one carload, there was no definite contract. In its letter of January 8, 1916, the vendee ordered but one carload, proposing for itself "an option of 200 ton additional at same price after first car is unloaded." In its letter of January 12, it asks for a confirmation of the order and how soon it may expect the first carload, and, in addition, proposes to increase the order to 400 tons "if the hay turns out satisfactory." In both of these letters the orders for an additional quantity above the one carload are conditional. Were the condition reversed—that is, had the vendor shipped the 200 tons additional without a further order and sought to hold the vendee for the price on a refusal to accept the hay—it is difficult to see how a recovery could have been had. The vendor's letter of acceptance is not, it is true, in the terms of the order, but it proposed no new terms and must be construed in the light of the order. The third letter of the vendee, of course, adds nothing to the contract. The terms of the contract were expressed in the preceding letters, and the vendee was not then at liberty to put a construction upon them which they do not reasonably bear.

Since no hay was shipped under the order, the vendee can recover only for the quantity definitely ordered. It cannot now be known whether the option would have been exercised. While the privilege of exercising the option was denied the

vendee by the fault of the vendor, there is no rule by which the damages caused by such fault can be measured.

No authority directly in point has been called to our attention, but the general principle is well settled that an unconditional order and unconditional acceptance must be found in a contract evidenced by correspondence before there can be a recovery as for a breach. The following cases, while but a few of the many that could be cited, are illustrative: *Van Keuren v. Boomer & Boschert Press Co.*, 143 App. Div. 785, 128 N. Y. Supp. 306; *Hudson v. Arnold*, 29 Ky. Law 375, 93 S. W. 42; *Topliff v. McKendree*, 88 Mich. 148, 50 N. W. 109; *Martin v. Northwestern Fuel Co.*, 22 Fed. 596; *Johnson v. Stephenson*, 26 Mich. 63; *Smith v. Gowdy*, 90 Mass. 566; *Jenness v. Mount Hope Iron Co.*, 53 Me. 20; *Cornwells & Elliott v. Krengel & Seiferd*, 41 Ill. 394.

Our conclusion is, therefore, that there was no sale except as to the one carload. The stipulation covering this was that one car would contain thirteen tons, and that the measure of the vendor's liability would be at the rate of \$4.50 per ton.

The judgment is reversed, and the cause remanded with instructions to enter a judgment for the plaintiff in the sum of \$58.50.

ELLIS, C. J., MOUNT, HOLCOMB, and PARKER, JJ., concur.

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[No. 13964. Department Two. June 20, 1917.]

THE CITY OF HOQUIAM, *Respondent*, v. ERIC F. MOE *et al.*,  
*Appellants*.<sup>1</sup>

MUNICIPAL CORPORATIONS—IMPROVEMENTS — ASSESSMENTS — BENEFITS—EVIDENCE—SUFFICIENCY. An assessment for benefits from the condemnation of an alley is not shown to have been excessive, or upon a fundamentally wrong basis because the commissioners considered the benefits to an adjoining lot used in connection with the lot assessed, where there was no evidence or inference that any benefit to such adjoining lot was considered, and the assessment objected to was less than the amount assessed to other property similarly situated.

Appeal from an order of the superior court for Grays Harbor county, French, J., entered May 8, 1916, confirming an assessment roll made by eminent domain commissioners. Affirmed.

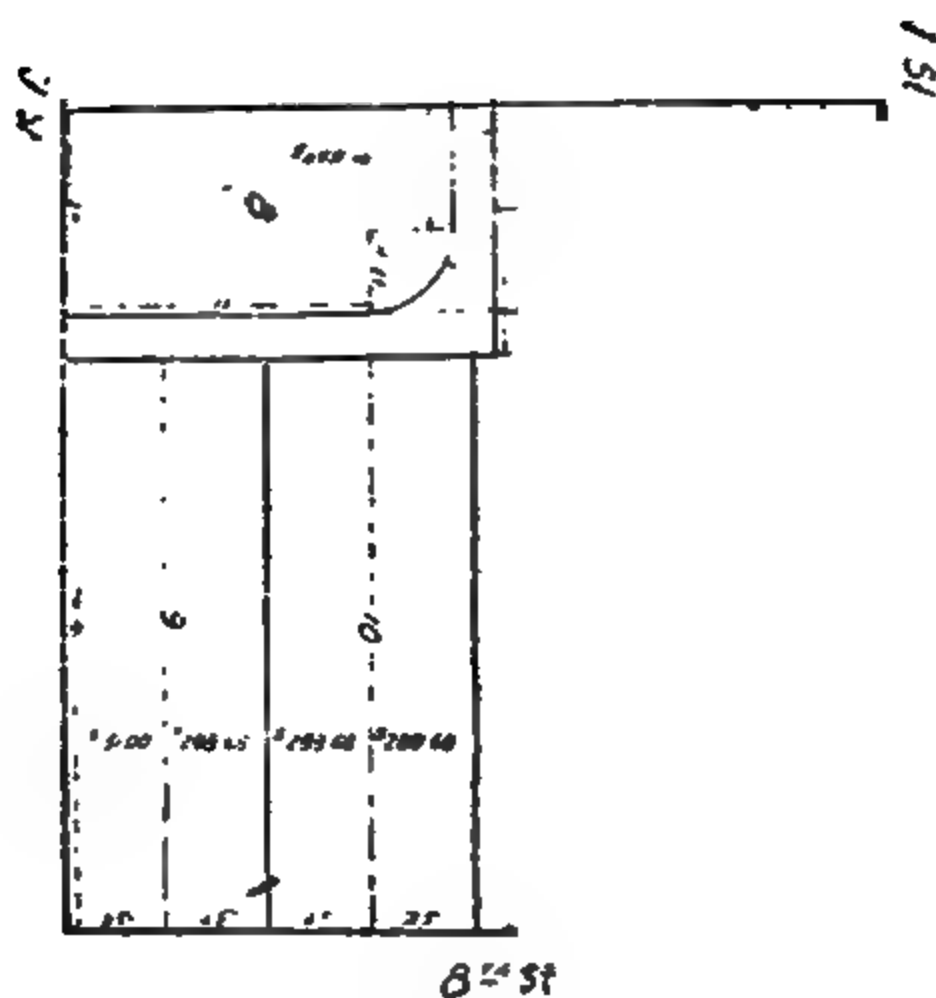
*William E. Campbell*, for appellants.

*Sidney Moor Heath*, for respondent.

HOLCOMB, J.—Appellants seek to reverse an order of the superior court confirming the assessment roll made by a board of eminent domain commissioners, assessing the cost of a public improvement levied upon a public improvement district in the city of Hoquiam for opening an alley through block 49, in the city of Hoquiam. A plat of the block, showing the location of the alley in the block, the assessment district, and the amount of the assessment placed upon each lot in the district, is herewith shown:

<sup>1</sup>Reported in 165 Pac. 1055.

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The appellants are the owners of the northwesterly one hundred feet of lot 3 in the block, shown on the plat as shaded

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in order to distinguish it from the other lots. It will be seen that lots 1, 4, and 12 of the block are omitted from the improvement district. This improvement was ordered in 1912, by an ordinance of the city which established an alley ten feet in width in L-shape through this block, provided for the condemnation of the necessary ground, and established the assessment district to pay the cost of the alley upon the property in the block benefited thereby, and also provided that the city should not be liable for any of the costs.

Condemnation proceedings were had and, after a trial by jury, a verdict was rendered for the damage to each lot, and appellants were awarded \$485 for the land taken from their lots. The jury found no damages to the remaining land owned by them. Judgment was entered upon this verdict, and it was provided that the owners of the abutting lots 2 and 3 might, when the alley was constructed, arcade the alley fifty feet back from the street and twelve feet in height above the surface of the alley. This provision was not made obligatory, but optional to the owners.

Appellants objected to the confirmation of the assessment roll returned by the eminent domain commissioners upon the grounds, and they now contend, that: (1) The eminent domain commissioners, in making the assessment upon appellants' lot, acted arbitrarily, fraudulently, and on a fundamentally wrong basis; (2) that the assessment is in excess of the benefits and inequitable; (3) that the board of eminent domain commissioners considered lot 4 benefited, which was not included in the assessment district, and added the benefit which they believed lot 4 received from the alley to lot 3 belonging to appellants, which was included in the improvement district.

The principal argument of appellants is made upon the supposition that the eminent domain commissioners considered some supposed benefits to lot 4, which is also owned by appellants, as accruing to them from the establishment of the alley, in assessing the benefits upon lot 3 which abuts

upon the alley. If this were true, then the assessment was made upon a fundamentally wrong basis. It is shown that the appellants used their property transversely to the manner in which it is platted, and that they sold a portion of both lots 3 and 4, being the southeasterly fifty feet of both lots fronting on the street and on the newly established alley, in that manner; but there is not a word of testimony that the eminent domain commissioners, in assessing the benefits that would accrue to lot 3, considered any benefits that might accrue secondarily to lot 4 belonging to appellants.

The only evidence there is upon that subject is the assessment roll of the commissioners and their oath attached thereto, wherein they say that "the property described in the roll is so assessed that each piece of property shall bear its relative equitable proportion of the full amount of the cost and expense of the improvement herein contemplated, and the assessment set forth apportions and assesses the amounts therein which are found to be a benefit to the property upon the several lots, tracts and parcels of land in the proportion in which they will be severally benefited by such improvement." This conforms strictly to the statute relating to such special assessments and, if actually so assessed, the assessments cannot be disturbed.

Appellants (the husbands) and two other witnesses testify concerning the assessment, and none of them testify that the commissioners, in assessing the benefits to lot 3, took into consideration the supposed benefits to lot 4, nor does any other witness; and none of these witnesses testify that, in formulating their own opinions as to the amount of benefits accruing or not accruing to lot 3, they took into consideration the amount that the other lots in the district would be benefited, or attempted in any way to compute the just assessments over the whole of the district according to the benefits received. In brief, their testimony is merely opinionative and not so well informed and considered as to be convincing.

It will be observed that appellants' lot, with a frontage of

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one hundred feet upon the alley, is assessed at \$785, and the same amount of land owned by three parties on the other side of the alley was assessed \$966.04, which tends to show that the commissioners in assessing the benefits were attempting in good faith to assess them with due regard to the benefits actually conferred, and tends to disprove that the property of appellants was assessed in excess of the benefits and inequitably, and that the board considered any supposed benefits to lot 4 in assessing appellants' lot 3, or proceeded upon a fundamentally wrong basis.

There is no just inference that can be derived from the testimony in the record which sustains the contentions of the appellants. Judgment affirmed.

ELLIS, C. J., MOUNT, and PARKER, JJ., concur.

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[No. 13716. Department Two. June 22, 1917.]

C. I. PECK *et al.*, Appellants, v. W. H. LINNEY *et al.*,  
Respondents.<sup>1</sup>

**CORPORATIONS—DISSOLUTION—STATUTES—EFFECT—ACTIONS.** A corporation, delinquent in its license fees, is dissolved by the secretary of state's notation of dissolution entered upon its failure to apply for reinstatement within six months, pursuant to Rem. Code, § 3715d, which provides that thereupon the corporation shall be dissolved and its property shall vest in the trustees; so that the corporation cannot be thereafter sued by service of process upon its president, or jurisdiction acquired of an action to foreclose a tax lien on its property without making the trustees parties.

**SAME—DISSOLUTION—LICENSE FEES—CONSTITUTIONAL LAW—DUE PROCESS OF LAW.** Rem. & Bal. Code, § 3715, providing that the names of corporations shall be stricken from the records of the secretary of state and the corporation dissolved for failure to pay the annual license fees, unless reinstated under § 3715a, is not unconstitutional as violative of the due process clauses of the state or Federal constitutions.

**SAME—DISSOLUTION—VALIDITY—PREMATURE ENTRY.** Under Rem. Code, § 3715d, providing for the dissolution of delinquent corpora-

<sup>1</sup>Reported in 165 Pac. 1080.

tions failing to apply for reinstatement within six months, by the entry of a notation by the secretary of state upon his records, a dissolution is not invalid from the fact that the secretary made the notation one day too soon, where the record was left standing subsequent to the time when it ought to have been made, since the making of the notation was a ministerial act.

**SAME—DISSOLUTION—STATUTES—AMENDMENT—EFFECT—ACTIONS.** Where a corporation was stricken from the records and dissolved under the act of 1909, Rem. & Bal. Code, § 3715a-3715d, for failing to pay its license fees or apply for reinstatement within six months, prior to the amendment of that act by the act of 1911, Rem. Code, § 3715a, which authorized a reinstatement of stricken corporations at any time and rendered the former provision for dissolution inoperative, such dissolution is effectual while the corporation remains in a dormant condition, so that it cannot be sued in the absence of any steps for its reinstatement.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 12, 1916, in favor of the defendants, dismissing an action for equitable relief, tried to the court. Reversed.

*Carey & Johnson*, for appellants.

*A. E. Gallagher*, for respondents.

**PARKER, J.**—The plaintiffs, as stockholders of the Old Dominion Mining & Milling Company, a corporation, alleged to have been dissolved as the result of the failure to pay its annual license fees, seek a decree quieting title to certain mining claims in the trustees of that corporation, as against the defendants, and cancelling the tax deed upon which the claim of title made by the defendants is rested. The action is prosecuted by the plaintiffs as stockholders because of the refusal of the trustees of the corporation to do so upon demand made therefor by the plaintiffs. Trial upon the merits in the superior court for Spokane county, to which court the cause was transferred by consent from the superior court for Stevens county, resulted in judgment of dismissal as against the plaintiffs, from which they have appealed to this court.



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The facts determinative of the rights of the parties are not in dispute and may be summarized as follows: The Old Dominion Mining & Milling Company was duly incorporated under the laws of the state of Washington in the year 1897. It thereafter acquired title to the patented mining claims in question. It failed to pay to the state its annual license fees for several years prior to August 23, 1909, as required by § 6, ch. 140, Laws of 1907, p. 271, being Rem. Code, § 3714. On that day, because of such failure to pay its license fees, the secretary of state struck from the records of his office its name, in pursuance of the provisions of § 7, ch. 140, Laws of 1907, p. 271, being Rem. Code, § 3715; and it not having made application for reinstatement upon the records of the office of the secretary of state as prescribed by chapter 19, p. 57, Laws of the Extraordinary Session of the legislature of 1909, as the secretary of state construed that act, he, on February 23, 1910, entered upon the records of his office a notation that the Old Dominion Mining & Milling Company was dissolved. This, it will be noticed, was done just six months after striking the name of the corporation from the records of his office in pursuance of the provisions of the act of 1907. Rem. Code, § 3715.

On November 5, 1914, respondent W. H. Linney was the owner of a delinquent tax certificate issued by the treasurer of Stevens county for delinquent taxes upon the mining claims in question. On that day he commenced an action in the superior court for that county against the Old Dominion Mining & Milling Company, seeking foreclosure of his certificate of delinquency and the sale of the claims. That action resulted in judgment of foreclosure and order of sale on January 18, 1915. In pursuance thereof a sale was had of the mining claims and a tax deed issued by the county treasurer conveying the claims to respondent W. H. Linney on January 30, 1915. Thereafter respondent The Dominion Silver-Lead Mining Company acquired, by deeds of conveyance from Linney and wife, whatever title to the claims they

had acquired by virtue of the tax foreclosure and deed issued in pursuance thereof.

The service of the summons in the tax foreclosure proceeding was attempted to be made upon the Old Dominion Mining & Milling Company by serving the same upon G. B. Dennis, as the president of that corporation, and not otherwise. G. B. Dennis was the president of the corporation at the time the secretary of state noted upon the records of his office its dissolution. None of the trustees of the corporation were ever served with summons in the tax foreclosure proceeding or made parties thereto, nor did any of them ever appear in that proceeding; so that whatever jurisdiction the court acquired therein was only such as could be acquired over the corporation as an entity, apart from its trustees and stockholders, after the secretary of state noted its dissolution upon his records.

It is conceded that appellants, as stockholders of the Old Dominion Mining & Milling Company, are in a position to maintain this action because of their demand upon the trustees of that corporation to prosecute it and the refusal of the trustees to accede to that demand. It is also conceded that the tax foreclosure proceeding, the judgment, the sale rendered thereon, and the tax deed issued in pursuance thereof to W. H. Linney vested title to the claims in him, if the court acquired jurisdiction in that proceeding by service of summons upon G. B. Dennis as president of the corporation.

In § 7, ch. 140, Laws of 1907, p. 271 (Rem. Code, § 3715), we read:

“It shall be the duty of the secretary of state to strike from the records of his office the names of all incorporations which have neglected for a period of two years to pay their annual license fees;”

This is the law in compliance with which the secretary of state struck the name of the Old Dominion Mining & Milling Company from the records of his office on August 23, 1909. This provision of the law has remained unchanged to the

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present time. Chapter 140, Laws of 1907, p. 270, made no provision for reinstatement of the name of a corporation upon the records in the office of the secretary of state which had been stricken as therein provided. Neither did the law tell us, in terms, what effect such striking of the name of a corporation had upon its life, that is, whether or not such striking of its name had the effect of dissolving it. Chapter 19, p. 57, Laws of the Extraordinary Session of the legislature of 1909, provided for reinstatement of a corporation's name upon the records of the office of the secretary of state within six months following the striking of it therefrom upon payment of certain penalties. Section 4 thereof reads:

"If, however, within the period named within which a corporation may make application to be reinstated such corporation shall not have made such application, the secretary of state shall enter upon his records a notation that such corporation is dissolved, and it shall thereupon be dissolved and the trustees of such corporation shall hold the title to the property of the corporation for the benefit of its stockholders and creditors to be disposed of under appropriate court proceedings."

This is the provision in pursuance of which the secretary of state noted upon his records the dissolution of the Old Dominion Mining & Milling Company on February 23, 1910, six months after he had stricken its name from his records. This section was embodied in Rem. Code as § 3715d, though, as we shall presently see, under a later law, chapter 41, Laws of 1911 (Laws 1911, p. 135; Rem. Code, § 3715a), corporations are no longer dissolved in this manner. That law, however, was not passed until after the Old Dominion Mining & Milling Company had been dissolved under the law of 1909.

It is contended, in substance, in respondents' behalf that the failure of a corporation to pay its annual license fees, the striking of its name from the records of the office of the secretary of state, and the notation of its dissolution by the secretary of state upon his records did not, under the act of 1909, actually work a dissolution of the corporation, but only

constituted a cause for dissolution by appropriate court proceedings. This contention is answered by our decision in *Hawley v. Bonanza Queen Min. Co.*, 61 Wash. 90, 111 Pac. 1073, where it was held that the notation of dissolution, when made in compliance with the law of 1909, did work a dissolution of the corporation, and that an action pending against the corporation at the time it was so dissolved would abate, unless the corporation's successors in interest, its trustees, or possibly its receiver, were substituted as parties to the action in place of the corporation. Judge Rudkin, in so holding, speaking for the court at page 93, said:

"The appellant contends that this rule does not obtain in equity, but we apprehend that a defendant to proceed against is just as essential in one court as in another, except where the proceedings are strictly *in rem*. In actions to foreclose mortgages or liens on real property the owner of the property is a necessary party defendant, and if he dies during the pendency of the action his heirs or successors in interest must be brought in. The same rule applies of necessity to a defunct corporation. Had the receiver been served in this case, the action might have proceeded to judgment against him, notwithstanding the dissolution of the corporation; or the trustees, in whom title vests upon dissolution, might have been substituted as defendants, but nothing of that kind was done or attempted. The appellant persisted in his right to proceed against the corporation notwithstanding its dissolution, and the court had no alternative but to abate the action."

In the light of that decision, which we are not inclined to recede from, we see no escape from the conclusion that the Old Dominion Mining & Milling Company was dissolved upon the making of the notation of its dissolution by the secretary of state, assuming for the present that such notation was authorized by the facts and timely made. It seems to plainly follow that, since a pending action against a corporation at the time of its dissolution in pursuance of the law of 1909 abated upon such dissolution, unless its successors in interest be substituted in its place as parties thereto, it could not be

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sued, and no process could reach it as a corporate entity giving a court jurisdiction over it or its property which had passed to its trustees upon dissolution. Manifestly, if a pending case cannot proceed against a dissolved corporation, one could not be instituted against such a corporation.

It is further contended in behalf of respondents that the law of 1909, in so far as it provided for dissolution of corporations, is unconstitutional as being in violation of the due process of law provisions of both the state and Federal constitutions. This contention is also answered by our decision in *Hawley v. Bonanza Queen Min. Co.*, *supra*. Judge Rudkin, speaking for the court, observing:

"It is next contended that the acts of 1907 and 1909, *supra*, which provide for the dissolution of corporations failing to pay their annual license fees, or to apply for reinstatement within a limited time, are unconstitutional and void, because a forfeiture of corporate franchises can only be decreed by a court of competent jurisdiction. This position is untenable. A corporation is a mere creature of the law, and the privilege of being and acting as a corporation is contingent upon a compliance with the law. The appellant concedes that it was competent for the legislature to provide for the dissolution of corporations failing to pay their annual license fees, but contends that the forfeiture can only be declared after a hearing in some court of competent jurisdiction. This question was ably reviewed in all its aspects by the supreme court of California in the recent case of *Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 638, 103 Pac. 341, where a similar act of that state was sustained."

In the light of these remarks, made in the course of that decision, we deem it unnecessary to further notice the constitutional question presented, and conclude that the dissolution provision of the law of 1909 was not unconstitutional.

It is further contended in respondents' behalf that the notation of the dissolution of the Old Dominion Mining & Milling Company as a corporation upon the records of the office of the secretary of state was a void and unauthorized act and did not, at the time it was made nor thereafter,

legally evidence the dissolution of that corporation. Counsel for respondents insist that the full six months' period prescribed by the law of 1909, above quoted, within which the Old Dominion Mining & Milling Company might have applied for reinstatement, had not expired at the time the notice of dissolution was made by the secretary of state. The general rule that, in computing time within which an act is to be done as prescribed by law, the first day shall be excluded and the last day included, is invoked in respondents' behalf. This rule does seem to lend support to the contention that the secretary of state made his notation of the dissolution of the corporation one day too soon, since it seems to have been made upon the last day of the six months' period prescribed; though, looking to the language of the act of 1909, there is also room for arguing that the notation was not made a day too soon. However this may be, we are of the opinion that, since, on the following day, the notation remained of record in the office of the secretary of state, which was, of course, with his knowledge, it then had all the effect as if made upon that date. The act of 1909 did not provide for any particular form of making the notation of dissolution, not even that it should be dated, nor was the making of it under that law to be the result of any hearing or determination of any fact outside the records of the secretary's office. His act of noting the dissolution of the corporation, we think, was purely ministerial under the law of 1909. It was not the notation which dissolved the corporation, though sometimes loosely so referred to. That was only the doing of an act the occurrence of which, together with the fact of the corporation's default, worked its dissolution. We think it can thus be differentiated from a decree of a court of equity dissolving a corporation. If, when the time for making the notation of dissolution arrived, assuming that such time had not arrived when this notation was physically made, the secretary had looked at his records and seen this notation thereon and had then erased it and immediately rewritten it in the exact words, plainly it

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could not be contended that that was not a literal compliance with the act of 1909. We can see no difference in legal effect when the secretary knowingly leaves a notation on his records which may have been previously erroneously put there, though at the time he so leaves it it speaks correctly, except possibly as to the date when physically made. One could as well complain of a notation made by one of the secretary's clerks instead of himself, but plainly that would be in law the making of it by himself, if done with his knowledge and under his direction. The leaving of the notation by him at a time when it ought to have been made, we think, was equally a compliance with the law of 1909, in view of the ministerial character of the act of making the notation.

After the dissolution of the Old Dominion Mining & Milling Company on February 23, 1910, the legislature of 1911 passed an act amending the 1909 law so as to permit a corporation whose name had been stricken from the records of the office of the secretary of state to have its name reinstated upon the records *at any time* upon payment of certain penalties, and in effect repealing the dissolution provisions of the law of 1909. Considering the effect of the act of 1911 touching its repealing effect upon the dissolution provision of the law of 1909, Judge Morris, speaking for the court in *State ex rel. Preston Mill Co. v. Howell*, 67 Wash. 377, 121 Pac. 861, said:

"The act of 1907, being Rem. & Bal. Code, § 3715,, provided, among other things, that the secretary of state should strike from the records of his office the names of all corporations which had neglected for two years to pay the annual license fees. The act of 1909, extra session, being Rem. & Bal. Code, § 3715a, provided that any corporation whose name had been stricken for failure to pay its annual license fee for two years might apply to the secretary of state for reinstatement, at any time within six months from the approval of the act or from the time its name had been stricken. Section 2 of the same act, being Rem. & Bal. Code, § 3715b, further provided that any corporation so applying should, in addition to all license fees and penalties then due, pay an



additional penalty of \$25, and upon such payment such corporation would be reinstated. Section 4 of the same act, being Rem. & Bal. Code, § 3715d, provided that any corporation failing to make application for reinstatement within the time provided for such reinstatement should be thereby dissolved, and the secretary of state should enter a notation to that effect upon his official records. Sections 3715a and 3715b were amended by the act of 1911, chap. 41, page 135, whereby the six months' limitation, in which reinstatement might be made, was made to read 'at any time after its name had been stricken,' and the penalty was increased from \$25 to \$100. So that the law, as it now reads, provides that a corporation failing to pay its annual license fees for two years shall be stricken from the records of the office of the secretary of state; that every corporation so stricken may apply at any time thereafter for reinstatement, and when so applying shall be reinstated upon payment of all license fees and penalties then due, together with an additional penalty of \$100. It will be noted that § 3715d, providing for the dissolution of the corporation for failing to apply within the time in which application might be made for reinstatement, which time was six months as fixed in the act of 1909, has now no force, since the act of 1911 changed the time in which such application might be made from six months to 'any time after its name had been stricken from the records'; and, since the dissolution was to take effect at the expiration of the time fixed in which application for reinstatement might be made, and that time is now, under the amendment of 1911, any time after the striking of the name, there is now no time fixed for such dissolution. Section 3715a, as amended by the act of 1911, reads, 'any corporation stricken from the records and dissolved as provided in this chapter,' may hold meetings and pass resolutions necessary to close out its affairs and such resolution of such 'stricken and dissolved corporation' is validated and approved.

"There is no provision, however, in this chapter for the dissolution of such corporation, as to how or when it shall take place; the only penalty to the offending corporation provided for in the act being the striking of its name from the official records of the secretary of state. The framers of this act evidently had in mind the provisions of § 3715d, which made provision for dissolution under the act of 1909. But



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they failed to fix a time in which the provisions of that section could become operative. The result is there is now no time in which this section, the only one containing any provision for the dissolution of corporations for failure to pay license fees, can become operative. When, therefore, relator applied to the secretary of state to accept its license fee, he should have done so, as it had made full compliance with the law, and within the time provided by the law in force at the time the application was made."

These observations suggest the possibility of corporations dissolved under the law of 1909 before the passage of the law of 1911, as well as those defaulting after the passage of the law of 1911, being entitled to reinstatement at any time under the law of 1911. However this may be, we think that in no event can a corporation dissolved under the act of 1909 before the act of 1911 was passed be sued as a corporate entity, by service upon its president, until its corporate existence is revived and its name reinstated upon the records of the office of the secretary of state as provided by the act of 1911, assuming, for the sake of argument, that a corporation dissolved under the act of 1909 before the passage of the act of 1911 can be so revived and its name reinstated upon the records of the office of the secretary of state. In *Soderberg v. McRae*, 70 Wash. 235, 126 Pac. 538, where there was involved the status of a corporation dissolved under the act of 1909 before the passage of the act of 1911, Judge Morris, again speaking for the court, said:

"No question is raised by the corporation itself as to the effect of the act of the secretary of state in entering the order of dissolution on February 23, 1910. Nor is the corporation here seeking to reinstate itself by offering to pay arrears of license. So far as the dissolution of the corporation is concerned, it must be so regarded until, in some appropriate proceedings, it is decreed otherwise."

Without deciding the question of the status of a corporation dissolved under the act of 1909 before the passage of the act of 1911 as to its capability of being revived and re-

instated upon the records of the office of the secretary of state, we are clearly of the opinion that, while it remains in this at least dormant condition, it cannot function as a corporate entity, that it cannot either sue or be sued as such, and that whatever litigation may be instituted seeking to affect its property must be in actions wherein its successors in interest, its trustees, or possibly its receiver, are parties.

We conclude that the tax foreclosure proceeding and the tax deed issued in pursuance thereof, upon which the claimed title of respondents to these mining claims is rested, is wholly void and of no effect for want of jurisdiction of the court in that proceeding over the Old Dominion Mining & Milling Company or over its successors in interest, to wit, its trustees. The judgment of the trial court must therefore be reversed, and the cause remanded to it for the rendering of such decree as appellants are entitled to under the views herein expressed.

We find at page eight of the statement of facts that it was agreed between counsel during the trial that the respective rights of the parties growing out of the making of improvements upon the mining claims by respondents, which were claimed to have been made in good faith since the tax sale, should remain open and not be settled by the decree to be rendered in this case, indicating that the only purpose of all parties to this action was to test the validity of the tax foreclosure proceedings and respondents' claimed title thereto. The record before us also shows that, at the time of the commencement of this action in the superior court, appellants tendered \$2,550, depositing the same in court, to reimburse respondents for moneys paid in procuring the certificate of delinquency and in taxes upon the claims. We think the superior court will be sufficiently advised as to the nature of the decree appellants are entitled to, both as to the reservation of the question of respondents' equities growing out of improvements claimed to have been made by them upon the mining claims, and as to the amount of the \$2,550, tendered

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by appellants and deposited in court, which respondents are entitled to, or as to whether or not respondents are entitled to more than that sum as a condition precedent to appellants being awarded a decree quieting their title to the mining claims as against respondents. This is about as definite directions as we are able to make to the trial court upon the record before us.

The judgment of dismissal is reversed, and the cause remanded to the superior court for further proceedings as herein indicated.

ELLIS, C. J., HOLCOMB, MOUNT, and FULLERTON, JJ., concur.

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[No. 13721. Department Two. June 22, 1917.]

LAUBACH UNION CHECK VALVE COMPANY, *Respondent*, v.  
HIRAM F. LAUBACH, *Appellant*.<sup>1</sup>

PATENTS—ASSIGNMENTS—EVIDENCE—SUFFICIENCY. Findings that an assignment of patent rights were to be unconditional are sustained where records of corporate minutes, made when there was no controversy, so indicated, the first suggestion for restriction was made by an attorney after the agreement, and the interested testimony of the assignor was contradicted by less interested testimony.

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence will not be disturbed where the evidence does not preponderate against them.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered March 27, 1916, upon findings in favor of the plaintiff, in an action for equitable relief, tried to the court. Affirmed.

*Leo & Flasket* and *H. F. Garretson*, for appellant.

*Gordon & Easterday* and *Belcher & Gordon*, for respondent.

<sup>1</sup>Reported in 165 Pac. 1053.

HOLCOMB, J.—As the result of an action by respondent to compel appellant to execute and deliver to it unrestricted and unqualified assignments of United States and Canadian letters patent for a union check valve invention and to quiet its absolute title thereto and for other equitable and injunctive relief, after a trial upon the merits, the demands of respondent were granted.

Appellant was the holder of letters patent from the United States and Canada covering certain inventions for improvements in unions and valves. On April 22, 1914, the respondent corporation was organized in this state by the appellant and two other incorporators, for the purpose of manufacturing and selling a device covered by the patents. On April 27, 1914, at the first meeting of the board of trustees of the respondent, appellant made an assignment of the letters patent issued to him by the United States, which contained the following restrictive provision:

“Provided, however, that I do not release or relinquish my claim, interest or title, or any of them, in the event that the Laubach Union Check Valve Company becomes insolvent.”

Afterwards, on July 17, 1914, appellant made to the respondent another assignment of the same letters patent, except that it was more formally executed, which was registered in the patent office of the United States. The Canadian patent was subsequently assigned in the same restricted terms. The capital stock of the respondent company consists of five thousand shares, of the par value of \$10 per share. Under the preliminary agreement between himself and the company, appellant received 2,500 shares as representing his interest in the company. The assigned interests in the patents were the sole assets of the company when organized.

The one determinative question on this appeal is this: Are the restricted assignments made by appellant the assignments agreed upon between him and respondent? This is purely a question of fact.

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It was properly conceded by respondent that it is a fundamental proposition that, under the patent laws of the United States, a patentee enjoys absolute freedom in the use or sale of the rights granted thereunder. This being true, appellant could grant an exclusive license or monopoly of his patent, or a restricted and qualified license or use of it, or he could assign the letters patent absolutely and without restriction.

There is a sharp conflict of evidence in this record as to whether appellant agreed, before the assignment was made, that the assignment of all his right, title and interest in his letters patent should be made absolute, or that the restriction set forth herein should be made for his protection and benefit.

The minutes of the first meeting of the board of trustees, made prior to the execution of the assignments, stated that the appellant transferred the letters patent to the respondent. In that connection there was no allusion to a qualified or restricted transfer by assignment. Appellant seems to think that the respondent and the trial court took the position that the minutes were to be considered as conclusive as to the nature of the transfer, and that therefore the transfer must necessarily be construed as unconditional. Much stress is laid on an observation of the trial judge as follows:

“The records which are binding are simply that there was an assignment. They used the word ‘transfer’ and it is not qualified.”

It is vigorously contended that this shows the trial judge had an erroneous conception of the law, and that, for that reason, he did not correctly weigh the evidence. But an examination of the further observations of the trial judge in passing upon the merits of the case discloses that he did weigh the conflicting evidence and simply used the minutes as so much evidence, not conclusive, but entitled to so much weight in support of the view that it was intended and agreed by the transferer and transferee of the assignment that the assignment was to be unconditional and unrestricted. The minutes were made when there was no apparent controversy,

and with the full knowledge of both parties and approval of appellant. There is evidence, also, that the first suggestion to the appellant that such a condition should be incorporated in the assignment in order to protect him in case of the insolvency of the corporation during the life of the letters patent, was made to him by the attorney to whom the parties went for the preparation of the instrument which consummated their agreement. While this is contradicted by the appellant, it is to be borne in mind that the appellant is one of the most interested parties, and that there is other testimony not so interested in character contrary to his testimony, and that the court weighed all the evidence and found against appellant. While this case is to be tried *de novo* upon the record, considerable weight is to be given the findings of the trial court upon conflicting testimony where it is apparent that he properly weighed the conflicting testimony and decided according to his judgment. The evidence does not preponderate against the court's finding.

The decree is therefore affirmed.

ELLIS, C. J., MOUNT, PARKER, and FULLERTON, JJ., concur.

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[No. 13790. Department Two. June 22, 1917.]

W. W. HOPKINS, *Appellant*, v. COPALIS LUMBER COMPANY,  
*Respondent*.<sup>1</sup>

NEW TRIAL—WAIVER. The right to a new trial is waived where the party had knowledge of acts constituting misconduct of the jury and prevailing party while absent on a view of the place of the accident, at the time they occurred, and failed to call the court's attention thereto prior to return of the verdict.

Appeal from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered April 15, 1916, upon the verdict of a jury rendered in favor of the defendant, in an action in tort. Affirmed.

*Morgan & Brewer* and *A. Emerson Cross*, for appellant.

*W. H. Abel* and *George Dysart*, for respondent.

FULLERTON, J.—The appellant, W. W. Hopkins, while driving an automobile along a county road in Grays Harbor county, attempted to cross a railroad track, when he collided with a train of cars operated by the respondent, Copalis Lumber Company, and received injuries for which he sues in this action. The cause was tried by the court sitting with a jury. At the close of the evidence, the court concluded it proper that the jury should have a view of the place of the accident, and directed that they be conducted there for that purpose. They were so conducted and returned, when the trial proceeded to its conclusion, the jury returning a verdict for the respondent. After the return of the verdict, the appellant moved for a new trial on the grounds, among others, of misconduct on the part of the jury and misconduct of the prevailing party, supporting the motion by affidavits. The affidavits disclosed that the claimed misconduct occurred while the jury were absent from the courtroom on the view of the place of the accident. Counter affidavits were filed,

<sup>1</sup>Reported in 165 Pac. 1062.

after which the court overruled the motion for a new trial and entered a judgment in accordance with the verdict.

The only error assigned on this appeal is the overruling of that part of the motion for a new trial which is based on the misconduct of the jury and prevailing party. But whether the acts of misconduct shown to have been committed were of such a nature as to require a new trial we shall not determine, as we have concluded that the appellant is not in a position to make the objection. The rule is general that, when a party moves for a new trial on the ground of misconduct which occurred during the course of the trial, he must aver and show affirmatively that he and his counsel were ignorant of the misconduct charged until after the trial. The rule and the reasons for it are well stated by Mr. Thompson in his work on Trials, vol. 2 (2d ed.), § 2613, in the following language:

“In pursuance of the maxim, *omnis consensus tollit errorem*, the consent of the unsuccessful party in a civil case, to an irregularity in the conduct of a jury, will always estop him from claiming a new trial on that ground. Moreover, if he is cognizant of the irregularity, and does not avail himself of the first opportunity to call the attention of the court to it, he thereby *waives* any right to make it the ground of an objection. If he fails to do this, he cannot raise such an objection for the first time by motion for a new trial. The rule proceeds upon the ground that the party ought not to be permitted, after discovering an act of misconduct which would entitle him to claim a new trial, to remain silent and take his chances of a favorable verdict, and afterwards, if the verdict goes against him, bring it forward as a ground for a new trial. Such a course is inconsistent with the candor and good faith which should characterize judicial proceedings. . . . In cases where this principle is applied, it follows that, where a party moves for a new trial on the ground of misconduct on the part of the jury, which took place during trial, he must aver in his motion, and show affirmatively that he and his counsel were ignorant, until after the jury had retired, of the fact of such misconduct.”



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A somewhat similar question was before us in the case of *In re Jackson Street*, 47 Wash. 243, 91 Pac. 970. In that case the court directed that the jury view the premises in charge of one of the court bailiffs, and that a Mr. Jeffrey, a witness for the plaintiff city, go along and point out to the jury the particular tract in controversy. At the time the order was made, the defendants interposed a general objection "to allowing Mr. Jeffrey or any person to go with the jury except a court bailiff." In an affidavit filed in support of a motion for a new trial, the further objection was made that Mr. Jeffery was an officer of the city and a witness on the trial, and was not sworn to perform any duty except as such witness. The trial court overruled the motion for the new trial, and the defendant appealed. Passing upon the specific objections to the appointment of Mr. Jeffrey, we held that they could not be urged in this court, for the reason that they were not taken at the time of his appointment; saying in the course of the opinion:

"Objections to the personnel of the person appointed or that he was not sworn should be taken at the time of the appointment, and cannot be urged for the first time on motion for new trial."

See, also, *Grantz v. City of Deadwood*, 20 S. D. 495, 107 N. W. 832; *Woodruff v. Richardson*, 20 Conn. 238; *Peterson v. Skjelver*, 43 Neb. 663, 62 N. W. 43; 12 Ency. Plead. & Prac., p. 558.

Here the affidavits filed in the case make it clear that the appellant and his counsel had knowledge of certain of the acts constituting the claimed misconduct at the time they occurred, and it is not averred, nor attempted to be proven, that they did not learn of all of them prior to the time the cause was submitted to the jury. Since they failed to call the attention of the court to the matters of which they had knowledge prior to the return of the verdict, and since they do not aver that the others were unknown to them prior to

the rendition of the verdict, we are constrained to hold that they could not successfully urge them in support of a motion for a new trial.

The judgment is affirmed.

ELLIS, C. J., MOUNT, PARKER, and HOLCOMB, JJ., concur.

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[No. 13819. Department Two. June 22, 1917.]

MATT ENNIS, *as Administrator etc., Appellant*, v. NEW  
WORLD LIFE INSURANCE COMPANY, *Respondent*.<sup>1</sup>

EVIDENCE — PAROL EVIDENCE — TO VARY WRITING — ILLEGALITY — FRAUD. Parol evidence contradicting a stock subscription is admissible upon an issue raised by the pleadings that the subscription contract was fraudulent as to subsequent subscribers and in violation of law.

CORPORATIONS—STOCK—SUBSCRIPTIONS—VALIDITY — FRAUD OF PROMOTERS. A trust subscription contract, made for the benefit of the promoters and incorporators of an insurance company, is void and cannot be enforced against the corporation repudiating the same on notice from the insurance commissioner that it was discriminatory against other purchasers of stock, where it appears from a subsequent agreement that it was only optional, giving the incorporators the privilege of acquiring the stock in return for services in case the selling price should go to a premium, thereby making a secret profit, but otherwise attaching no liability to the subscription, although *prima facie* it was *bona fide*; since the promoters stand in a fiduciary capacity, and to hold such a subscription out to the public as binding was a fraud on future subscribers.

Appeal from a judgment of the superior court for Spokane county, Hon. Frank H. Rudkin, judge *pro tempore*, entered February 3, 1916, upon findings in favor of the defendant, dismissing an action to recover under a stock subscription contract. Affirmed.

*Kenneth Durham* and *Oscar Cain*, for appellant.

*Thomas A. E. Lally* and *Graves, Kizer & Graves*, for respondent.

<sup>1</sup>Reported in 165 Pac. 1091.

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FULLERTON, J.—Thomas J. Ennis was one of the promoters and incorporators, and a member of the directorate, of the Roman Catholic Life Insurance Company of America, the name of which was afterwards changed to the New World Life Insurance Company. Ennis, claiming under a subscription to corporate stock made in the name of E. J. Cannon, as trustee, began an action to recover the difference between his subscription price of the stock and its market value on October 7, 1913, the date on which the subscription was repudiated by the corporation. From a judgment dismissing his action, an appeal was taken. Pending appeal, the plaintiff died, and his brother, Matt Ennis, as administrator, was duly substituted as party plaintiff and appellant.

The appellant assigns as errors the action of the court, (1) in admitting parol evidence to vary the terms of the stock subscription contract; and (2) in holding the subscription contract unenforceable. The insurance company was organized on February 26, 1910, with a capital stock of \$2,000,000, divided into 200,000 shares. There were seven incorporators who subscribed to the stock. By agreement between them, E. J. Cannon, as trustee, subscribed for 20,000 shares in addition to their regular subscriptions, which were to be held for the benefit of the incorporators. The subscription covered only 23,400 shares. The sale of the balance of 176,600 was to be promoted by the Columbia Finance Company, with which a contract to that effect was entered into by the insurance company. The incorporators, concluding afterwards that the company could not legally conduct business unless its full capital stock was subscribed, caused one of the incorporators, Thomas A. E. Lally, to make a *pro forma* subscription for the 176,600 shares which were to be handled by the finance company. The trust agreement between the incorporators was put into the following written form:

“This contract, made and entered into this 26th day of February, 1910, by and between Edward J. Cannon, party of

the first part, and Thomas A. E. Lally, Thomas J. Ennis, Henry B. Luhn, John J. Cadigan, Edward J. O'Shea, and Edmund Burke, parties of the second part, all of both parties being the entire incorporators and founders of the Roman Catholic Life Insurance Company of America;

Witnesseth:

"(1) That Edward J. Cannon, party of the first part, for and in consideration of the sum of one dollar to him in hand paid by the parties of the second part, receipt of which is hereby acknowledged, and for and in consideration of the association of all the parties hereto, and their incorporating the Roman Catholic Life Insurance Company of America, agrees to be, and is hereby declared to be trustee of twenty thousand shares of the capital stock of Roman Catholic Life Insurance Company of America, for and in behalf of himself and the parties of the second part, as set out in the contract between said company and the Columbia Finance Company, a copy of which is hereto attached and marked Exhibit 'A,' and hereby made a part hereof.

"(2) Said twenty thousand shares is reserved out of the remainder of the stock on hand after the sale of the first, second and third and fourth series or assignment as set out in said contract above mentioned and hereto attached.

"(3) The method of apportioning and distributing said twenty thousand shares among the said seven incorporators of the Roman Catholic Life Insurance Company of America shall be as follows: the proportion which the amount of stock that each of the above seven incorporators has purchased and is holding for himself in said company, at the time the said first, second and third and fourth series or assignments are sold, bears to the total amount so purchased and held by all of said seven incorporators is the ratio and proportion in which said twenty thousand shares shall be distributed among said seven incorporators.

"(4) The distribution of said twenty thousand shares among the said seven incorporators shall be at any time after the sale of said first, second and third and fourth series or assignments of stock, as set out in the above mentioned contract hereto attached. A certificate of stock shall be issued to each incorporator for the amount of his proportionate part of said twenty thousand shares immediately upon his payment to the Roman Catholic Life Insurance Company of

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America of the price of twelve dollars and fifty cents per share for all of the stock to which he is so entitled.

"(5) It is expressly understood that the right which each of said seven incorporators has, as beneficiary in this contract, cannot be assigned or disposed of to any one except to a member or members of the parties to this contract.

"(6) That if any one of said seven incorporators disposes of all of his stock in the Roman Catholic Life Insurance Company of America before the sale of said first, second and third and fourth series or assignments shall have been completed, he loses all right and title to the benefit of this contract, and his interest so lost by him, shall revert to the remaining incorporators in proportion above mentioned; and if he shall have already assigned his interest and subsequent thereto, disposed of all his stock in said company, before the sale of said first, second and third and fourth series or assignment shall have been completed, such assignment shall be of no effect whatever."

Later the board of directors of the insurance company, composed of all the original incorporators except Ennis, who had withdrawn from the board, entered into the following agreement with themselves as individuals:

"(1) Whereas on the 26th day of February, 1910, one certain agreement was executed by E. J. Cannon, as party of the first part, and John J. Cadigan, Edmund Burke, Thomas J. Ennis, Henry B. Luhn, Edward J. O'Shea, and Thomas A. E. Lally, as parties of the second part, all of whom are parties to this agreement, and all of whom are incorporators of company, which said agreement of February 26th, 1910, purported to set out the interests of the said parties in and to the said twenty thousand shares of the capital stock of company subscribed for by E. J. Cannon, trustee for and on behalf of said incorporators.

"(2) Whereas, The said E. J. Cannon wishes to be relieved and to resign as trustee of said twenty thousand shares, and

"Whereas, The parties hereto wish to have the rights and interests of each of them in said twenty thousand shares definitely and correctly set out herein.

"Therefore, in consideration of the execution of this agreement by each party hereto, and in consideration of the sum

of one dollar (\$1) paid by each party hereto to each of the other parties hereto, the receipt of which by each of whom is hereby acknowledged, and for other valuable and legal considerations, it is expressly understood and agreed:

"(3) That this agreement is substituted for and supercedes in every respect said agreement of February 26th, 1910; that the resignation of E. J. Cannon as trustee of said twenty thousand shares is hereby accepted by the parties hereto, and in his stead and place is hereby substituted 'The National Bank of Commerce of Spokane,' a corporation, hereinafter called 'Bank,' as hereinafter provided.

"(4) It is agreed and understood that the said incorporators are entitled, subject to the terms of this agreement, to the following respective parts of said twenty thousand shares:

"E. J. Cannon, five thousand shares (5,000)

"Thomas J. Ennis, five thousand eight hundred eighty-two shares (5,882)

"John J. Cadigan, two thousand nine hundred forty-two shares (2,942)

"Edmund Burke, one thousand one hundred seventy-six shares (1,176)

"Henry B. Luhn, two thousand nine hundred forty-two shares (2,942)

"Edward J. O'Shea, five hundred eighty-eight shares (588)

"Thomas A. E. Lally, one thousand four hundred seventy shares (1,470)

"(5) There shall be issued by company, seven (7) certificates of its capital stock in the respective amounts and to the respective parties as in the last preceding paragraph set out, and all of which certificates shall be delivered by said company to bank, to be held by it in escrow for and on behalf of the parties hereto as herein provided, each one of said certificates shall be marked thusly:

"This certificate is issued in escrow for the benefit of the party named herein, and title does not pass to said party in and to any part of the shares named herein, and no part of the same is assignable unless the terms of one certain contract of option executed by said party are complied with.'

"(6) At any time or times prior to September 1st, 1916, any of said incorporators may pay to company, or to bank,

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for said company, \$12.50 per share for any part or parts of at least fifty (50) or more shares of his share of said twenty thousand shares, at which time or times company shall issue to him a certificate, or certificates, for the amount or amounts so paid by him, and will cancel the certificate for his share of said twenty thousand shares so held by bank, and will issue and deliver to bank a new certificate marked as was the original, of his share still unpaid, which last mentioned certificate will be held by bank, as was the original certificate, and will be subject to the same provisions set out herein, until his share of said twenty thousand shares, shall have been fully issued to him; provided, however, if any of said twenty thousand shares remains unpaid after September 1st, 1916, the certificate or certificates therefor shall be delivered to company by said bank, and the original incorporators shall thereupon forfeit any and all right to them which they may have in and to that part so unpaid on said date; it being further understood and agreed that no title shall pass from company to any of said incorporators in and to any part of said twenty thousand shares unless and until said incorporators shall have fully performed the provisions of this agreement which by him should be performed.

“(7) It is understood that this agreement is considered by company an option from it to the said respective incorporators to purchase their respective shares of said twenty thousand shares, according to the terms hereof, and that this agreement is executed by company in consideration of the services rendered and to be rendered by said incorporators to it and as above set out.

“(8) This agreement and option is executed by all of the parties hereto in nine copies, each one of which is in its terms exactly like this one, one of which shall be retained by each of said incorporators, one by bank, and one by company.

“(9) It is understood and agreed that no part of said twenty thousand shares shall be voted personally, or by proxy, at any corporate meeting of company, except that part which has been fully paid by any of the incorporators as herein provided, and it is further understood that the reasonable costs and expenses incurred in favor of bank by reason of its acting herein shall be paid by said original incorporators equally among themselves.

"(10) It is further understood and agreed that this contract and option is not affected, nor is its operation and effect to be affected, governed or changed in any manner, by the liability of any of said incorporators to company, because of subscriptions made by any of them, to the capital stock of company at any time prior or subsequent to the execution of this indenture." Dated September 9, 1911.

At the trial respondent, over the objection of appellant, introduced the testimony of five of the parties to the trust subscription, for the purpose of showing that the contract was in fact an option and not intended to impose an obligation on the subscribers. The court's ruling admitting the evidence was upon the ground that the whole matter was open to parol testimony, inasmuch as appellant was compelled to establish his interest in the subscription contract by parol. Whether or not parol was admissible on that ground, we think it was admissible on the issues raised by the pleadings, that the subscription contract was fraudulent as to subsequent subscribers and was violative of the statutes of this state respecting the organization of insurance companies. Where fraud or illegality inheres in a stock subscription contract, that fact may be shown by parol. *Anderson v. Scott*, 70 N. H. 350, 47 Atl. 607; *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 107 N. W. 629, 119 Am. St. 564; *Turner v. Grobe* (Tex. Civ. App.), 44 S. W. 898; *Collins v. Southern Brick Co.*, 92 Ark. 504, 123 S. W. 652, 135 Am. St. 197; *Commonwealth Bonding & Casualty Ins. Co. v. Bomar* (Tex. Civ. App.), 169 S. W. 1060.

Respecting the illegality of the subscription, the evidence showed that, for a period of three and one-half years, no payment was made on the subscription contract by its trustee, while all new subscribers to stock were required to pay up in full within sixty to ninety days after subscribing. By the terms of the agreement between the insurance company and the finance company, the trustee subscription was to be held in abeyance until 100,000 shares had been disposed of, which figure had not been reached on October 1, 1913, the date on



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which the respondent repudiated the trustee subscription. This repudiation was due to the fact that the state insurance commissioner had notified the company that the trust subscription agreement was a discrimination against the other purchasers of stock in favor of the directors of the company and a violation of the insurance code. That the incorporators of the company, in making their trustee subscription, in addition to those made in their individual capacities, intended to subject themselves to a merely optionable liability is clearly shown by their subsequent agreement attempting to fully define the arrangement as they understood it. In the agreement of September 9, 1911, they expressly declare:

"It is understood that this agreement is considered by company an option from it to the said respective incorporators to purchase their respective shares of said twenty thousand shares, according to the terms hereof, and that this agreement is executed by company in consideration of the services rendered and to be rendered by said incorporators to it and as above set out."

Under this agreement, the *cestuis que trustent* were given five years in which to have the privilege of exercising the option. The evidence shows that this block of stock was set aside for the benefit of the promoters, as a sort of perquisite to be availed of if the selling price of stock should go to a premium, but that otherwise no liability would attach on the subscription. Though *prima facie* a *bona fide* subscription, it was not such in fact, but was void as to subsequent subscribers; it was notice to the investing public that the 20,000 shares in question were actually subscribed, when they were not; and it provided for the reservation of a secret profit to the promoters to the exclusion of the other shareholders in the capital stock. At the time appellant brought his action, shares were selling at \$7.50 in excess of cost price, which on 20,000 shares would amount to \$150,000. On the basis of an advance of \$12.50 in the value of shares, appellant claims his damages as amounting to \$73,512.50. The mere state-

ment of these figures indicates that the loss to other stockholders is no immaterial matter, and that the secret profit arranged by the promoters for their own benefit would have been considerable.

Without going into the details of all the evidence, which is voluminous, we think enough has been set out to stamp the transaction as one designed to obtain an unfair advantage over other stockholders. It was one made by the promoters of the corporation and ratified by themselves as the board of directors of the organization.

The cause was tried before the Honorable Frank H. Rudkin, judge of the United States district court for the eastern district of Washington, who was called in as judge *pro tem* for the purpose of the trial in the superior court of Spokane county. In dismissing the action, he wrote an opinion which concisely analyzes the evidence and succinctly states the governing principles of law. From that opinion, we quote as follows:

"In my judgment the case might well be disposed of without considering any disputed questions of fact; but I will nevertheless refer briefly to some conflicts in the testimony. The plaintiff testified that the basis of apportioning the trust stock was agreed upon by all the incorporators before the subscription was actually made. In this he is not supported by the testimony of the other parties in interest. One of them testified that he was under the impression that an agreement or understanding of that kind existed; but he had no independent recollection of the facts or of anything that was said. On the other hand the other five incorporators testified positively that the mode of distribution was never discussed or agreed upon until at or about the time of the execution of the first written contract some months later, and that instrument, it will be recalled, distributes the stock on a slightly different basis. But as a matter of fact it is apparent from the record that little was said or thought about the trust subscription at the time it was made. The reason for this indifference is not far to seek. The parties were agreeing to pay twenty-five per cent above par for the stock of a two million dollar corporation whose assets consisted in a corpo-

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rate name, the right to exist, and an executory contract for the sale of its stock. Few if any of the incorporators knew or appreciated that they were incurring personal liability by reason of the trust subscription and the prospect of future gain was too remote to incite interest or even curiosity. Their view doubtless was that if the enterprise succeeded and the stock advanced beyond \$12.50 per share they would profit to the extent of the increase; but the thought that they might or could suffer a loss never occurred to them. Whether their view of the law or of the obligation assumed was correct, is another question. I am fully satisfied, therefore, that if the question of apportioning the trust stock came up for consideration at all it was only discussed between the plaintiff and one of the other incorporators and was never agreed upon or assented to by all until at or about the time of the execution of the written contract. This question is perhaps of little moment inasmuch as the allegation of the complaint relating to the apportionment of the trust stock was not denied by the answer; but it none the less has some bearing upon the credibility of the witnesses and the weight of the testimony. Again the plaintiff testified that he had made all arrangements to take up and pay for his portion of the trust stock which would involve an outlay of upwards of \$70,000, all or more than he was actually worth. This testimony seems utterly incredible. Why the plaintiff should expect or apprehend that the trustees of this corporation would make a call upon themselves for a quarter of a million dollars is incomprehensible to me. The probability, or even the possibility that such a call would be made is rebutted by every fact and every circumstance in the case. It is conceded that each of the incorporators was solicited to make his individual subscription as large as possible, and that each of them did so; and if the trust subscription was made on the same terms, and conditions, and subject to the same liabilities, well may we ask why was there a trust subscription at all. If the several incorporators were unable or unwilling to take more than thirty-four hundred shares in the aggregate why should they obligate themselves to take more than five times that number under the guise of a trust subscription? But these questions are answered by the record. The trust subscription was not made subject to the same terms and conditions as the individual subscriptions, and this fact was well understood. The

agreement with the Finance Company, executed on the same day, reserved from the remainder of the stock, after the completion of the sale of the first, second, third and fourth assignments, the twenty thousand shares of trust stock in question. This reservation shows very clearly that no one contemplated that the trust stock would be taken up or paid for until after the sale of one hundred thousand shares of the other stock, ten thousand shares at \$12.50 per share; ten thousand shares at \$15 per share; thirty thousand shares at \$17.50 per share, and fifty thousand shares at not less than \$17.50 per share. The agreement entered into some time late in 1910, but dated back to February 26th of that year, also provided that the trust stock should be distributed after the sale of the first four assignments. The last agreement of September 9th, 1911, by its terms superseded all prior agreements on that subject and provided that the trust stock might be taken up at any time prior to September 1st, 1916. As already stated, this latter agreement was a mere option imposing no obligation whatever upon the subscribers. Let us now examine briefly these different contracts and see if they gave the stockholders of the trust stock any advantage over other stockholders. While no formal call on the stockholders was ever made, it is admitted that the individual subscriptions of the incorporators were to be paid and the stock taken up immediately, or at least within a reasonable time, and that this was done. It is further admitted that the stock sold by the Finance Company was paid for in full within ninety days from the date of sale, one-fourth upon the day of sale and the balance within ninety days thereafter. Let us compare the situation of these stockholders with the subscribers to the trust stock. When the contract of September 9th, 1911, was entered into the stock of the company was selling readily at from fifteen to twenty dollars per share, and the plaintiff avers in his complaint that as early as October 17, 1913, it was of the reasonable value of \$25 per share, yet the trustees of the corporation granted themselves an option to purchase the stock, extending over a period of three years, for \$12.50 per share. The invalidity of this agreement, standing alone, is so apparent that the plaintiff does not attempt to uphold it, and I will not discuss it. True, he was not an officer of the corporation at that time, but the agreement simply carried out the details of arrangements

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made while he was an officer. The plaintiff, however, does not refer to or rely on this agreement. He plants himself squarely on the subscription contract and in effect says to the court, the contract is plain and free from ambiguity; it is enforceable against the subscribers, and therefore it may be enforced by them. In some respects his position is correct, and in others it is not. Possibly the subscription might be enforced against the subscribers; but that is at least a debatable question. Under the laws of this state a corporation cannot enforce subscriptions to its capital stock until the capital stock has been fully subscribed for. *Denny Hotel Co. v. Schram*, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. 130.

"There was no *bona fide* subscription to the capital stock of this corporation outside the twenty-three thousand four hundred shares, conceding that the trust subscription was a *bona fide* one, until long after the trust subscription was made. The subscription to the balance of the stock was merely formal to perfect the organization of the company, and that fact appears on the face of the subscription itself. Furthermore, the officer who made the formal subscription testified at the trial that he was not financially able to take care of even his small portion of the trust subscription. The first *bona fide* subscription to the stock was therefore made by the parties who purchased it through the Finance Company, and it may well be urged that the trust subscription could not be enforced until all the stock was subscribed and paid for at prices greatly in excess of \$12.50 per share. But conceding that the subscription might be enforced against the trustee and his *cestuis que trust*, it does not follow that it may be enforced by them. A contract made by a trustee with himself, in violation of his trust is always enforceable against him because he will not be heard to assert its invalidity; but it is almost universally held voidable at the instance of those whose rights are prejudiced thereby. Furthermore, the subscription in this case lacks many of the essential elements of the ordinary contract. The corporation could only act and speak through its authorized officers, and these officers were contracting and dealing with themselves. It is a universal rule of law that such contracts are closely scrutinized, and if it appears that the trustee gained an advantage over other parties for whom he was acting as trustee the contract is voidable at their option.

"In executing this mortgage and thereby securing to themselves advantages which were not common to all the subscribers, they were guilty of an unauthorized act, and violated a plain principle of equity applicable to trustees. "The directors are the trustees or managing partners, and the stockholders are the *cestuis que trust*, and have a joint interest in all the property and effects of the corporation, and no injury that the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of equity, be suffered to pass without a remedy.' *Koehler v. Black River Falls Iron Co.*, 2 Black 715, 721.

"But this rule of law is elementary and is supported by all the authorities, English and American, state and federal. Many cases are cited in the briefs; but the question involved is essentially one of fact. That question is, did the trustees of this corporation, by their contracts gain an advantage over other stockholders of the corporation? This question admits of but one answer. It is frankly conceded by the defendant that the trustees were guilty of no intentional wrong, and that concession is fully borne out by the testimony. They no doubt felt that they were hazarding their money in an enterprise which might fail, and that if the enterprise succeeded, they were entitled to some consideration for their efforts. But it must be remembered that other parties who purchased stock before the success of the enterprise became an assured fact took the same risk and were entitled to the same consideration. Conceding that the trustees were guilty of no moral wrong, yet they were plainly obtaining an advantage over other stockholders whose rights and property they held in trust, and their act in so doing is condemned by the law on grounds of public policy. Under such circumstances good intentions and honesty of purpose are of no avail.

"Perhaps it will be unnecessary to make any findings in view of the fact that there will be no affirmative judgment to support; but if the parties deem it necessary the only finding I will make will be that the trust subscription and all subsequent contracts gave the trustees an advantage over other stockholders and for that reason are nonenforceable. Let findings and judgment be submitted accordingly."

We adopt the foregoing opinion of the learned judge as the proper rule for the decision of the action. It is settled

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law that the promoters of a corporation stand in a fiduciary relation to the corporation, and are bound by the principles governing persons acting in a fiduciary capacity. It has been held that the gratuitous issue of corporate stock by promoters to themselves is a fraud on existing stockholders. *Hughes v. Cadena De Cobre Min. Co.*, 13 Ariz. 52, 108 Pac. 231. While no stock was issued in the present case, nor was it the intention that it should be gratuitous, the promoters had arranged for its issuance at a profit to themselves, which virtually made the issue gratuitous, sufficiently so at least to bring the transaction within the principles announced in the *Hughes* case. See, also, *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 107 N. W. 629, 119 Am. St. 564.

In 1 Thompson on Corporations (2d ed.), § 104, it is said:

“From this fiduciary relation it follows that the promoters must deal with the persons who come into the organization as members or stockholders, in the utmost good faith. . . . Neither will they be permitted, either by fraud or silence, to use their position for the purpose of speculation. The general rule conceded and adopted by the authorities is that under such circumstances promoters cannot take advantage of their position to make secret profits out of their transactions with or on behalf of the proposed corporation or the incorporators. . . . ‘Justice demands that the promoters of the company should not abuse the confidence placed in them by the stockholders, or derive any unjust advantage through their control over the organization or management of the company.’ . . . If the promoters obtain secret profits out of any transactions, and either they themselves become members of the board of directors, or persons under their control are elected as such directors, and the board thus composed adopts and ratifies the voidable transaction,—this, it has been held, will create no impediment to proceedings by stockholders for redress.”

While the transaction involved in this action is not, strictly speaking, one falling within the class of cases usually dealing with what are called “secret profits,” it comes within the principle of those cases, for the reason that the subscription



was made with the object in view of reaping a profit in the future at the expense of the other stockholders. See: *Mangold v. Adrian Irr. Co.*, 60 Wash. 286, 111 Pac. 173; *Yeiser v. United States Board & Paper Co.*, 107 Fed. 340; *Dickerman v. Northern Trust Co.*, 176 U. S. 181; *Davis v. Las Ovas Co.*, 227 U. S. 80; *Chandler v. Bacon*, 30 Fed. 538; *Brewster v. Hatch*, 122 N. Y. 349, 25 N. E. 505, 19 Am. St. 498; *Pietsch v. Milbrath*, 123 Wis. 647, 101 N. W. 388, 102 N. W. 342, 107 Am. St. 1017, 68 L. R. A. 945; *De La Motte v. Northwestern Clearance Co.*, 126 Minn. 197, 148 N. W. 47; *Torrey v. Toledo Portland Cement Co.*, 158 Mich. 348, 122 N. W. 614; *Tooker v. National Sugar Refining Co.*, 80 N. J. Eq. 305, 84 Atl. 10; *Parker v. Boyle*, 178 Ind. 560, 99 N. E. 986.

The optional subscription in the name of the trustee was made with no intention of enforcing it in case the company was not a success. It was held out to the public as a binding subscription, and thus a fraud on future subscribers, who would in all probability subscribe on the strength of the optional subscription. One for whose benefit such a fraudulent subscription was made could not enforce it against the corporation or its stockholders. *Getty v. Devlin*, 54 N. Y. 403; *White Mountains R. Co. v. Eastman*, 34 N. H. 124.

In the latter case, Eastman subscribed for thirty shares of stock, with a secret agreement with the directors that he should have an option to reduce his subscription to five shares. In passing upon the character of the transaction, the court said:

"It is the secret stipulation alone which operates in fraud of others, and upon *that* the law leaves the parties where they stand; declining to enforce it for the benefit of either; while, as to the other part of the contract [the stock subscription], to enforce it between the parties is what is necessary to defeat their fraudulent purpose as to other innocent persons. That the proceeding is a fraud upon third persons is clear from the relation in which subscribers for stock in a corporation of this kind stand toward each other. In the subscription of



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each person, every other subscriber has a direct interest. Their respective subscriptions are contributions or advancements for a common object. The action of each in his subscription may be supposed to be influenced by that of the others, and every subscription to be based upon the ground that the others are what upon their face they purport to be."

We think the findings and conclusions made by the trial court were supported by the evidence, and that there was no error in the admission of parol evidence designed to show the fraudulent character of the trustee's stock subscription.

The judgment dismissing the action is affirmed.

ELLIS, C. J., HOLCOMB, MOUNT, and PARKER, JJ., concur.

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[No. 13895. Department One. June 22, 1917.]

THE STATE OF WASHINGTON, *Respondent*, v. GREAT  
NORTHERN RAILWAY COMPANY, *Appellant*.<sup>1</sup>

COMMERCE—INTERSTATE COMMERCE—INTOXICATING LIQUOR—PERMITS—STATUTES—CONSTRUCTION. Since the Webb-Kenyon act, 1914 Fed. Stat. Ann. 208 (U. S. Comp. St. 1916, § 8739), was intended to divest of their interstate commerce character shipments of liquor in violation of state laws, it prohibits an interstate shipment into this state made in violation of Rem. Code, § 6262-18, which makes it unlawful for a transportation company to transport intoxicating liquor into the state without a permit issued by the county auditor and affixed to the parcel containing the liquor; hence it is immaterial to the rights of the railroad company shipping the liquor that the breach of the prohibition law related to the manner of shipment and that there is no general prohibition of the shipment of intoxicating liquor into the state.

SAME. Since the Webb-Kenyon act (U. S. Comp. St. 1916, § 8739) divests of their interstate commerce character shipments of liquor in violation of state laws, it is immaterial whether that act repealed U. S. penal statutes, §§ 238 to 240, Act. Cong. March 4, 1909, as to the manner of labeling, transporting, and delivering interstate liquor shipments.

<sup>1</sup>Reported in 165 Pac. 1073; 167 Pac. 1117.

INTOXICATING LIQUORS — SHIPMENTS — PERMITS — STATUTES. Although a permit for the shipment of liquor into the state had been issued, the shipment would be illegal unless the permit were affixed to the parcel, as required by Rem. Code, § 6262-18.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered August 4, 1916, upon findings in favor of the plaintiff, in an action seeking the seizure and destruction of intoxicating liquors shipped into the state in violation of the prohibition law, after a trial on the merits to the court without a jury. Affirmed.

*F. V. Brown, F. G. Dorety, and R. J. Hagman*, for appellant.

*The Attorney General and L. L. Thompson, Assistant, and W. P. Brown*, for respondent.

MAIN, J.—The purpose of this action was to cause the seizure and destruction of intoxicating liquor which, it was claimed, had been transported into this state in violation of law. The trial resulted in a judgment directing the destruction of the liquor. From this judgment, one of the defendants, the Great Northern Railway Company, appeals.

The facts are these: The subject of the controversy is fifteen casks of whiskey, of the value of five or six hundred dollars. On February 9, 1916, these casks were shipped by the Bernheim Distilling Company, at Louisville, Kentucky, to Collins & Company, regularly licensed pharmacists and druggists, in the city of Bellingham. The casks of whiskey arrived in Bellingham in due course of transportation, and were held by the railway company at its warehouse at that point awaiting delivery to the consignee, Collins & Company, at the time the warrant was issued and the property seized by the sheriff. No permit, as required by § 18 of the prohibition law, Laws of 1915, ch. 2, p. 13 (Rem. Code, § 6262-18), was affixed to the casks at the time of shipment, or at any time prior to the seizure. It is claimed by the appellant that, since the breach of the prohibition law related to the manner of shipment, and there was no violation of a law

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which prohibited the shipment of intoxicating liquor into the state, the railroad company had the right to carry the whiskey as an article of interstate commerce, even though in doing so it violated a provision of the prohibition law as to the manner or conditions upon which the transportation would be permitted. The act Congress passed during the year 1913, and known as the Webb-Kenyon law, 1914 Fed. Stat. Ann. 208 (U. S. Comp. St. 1916, § 8739) prohibits the shipment or transportation of intoxicating liquor from one state into another when such shipment would violate any law of the state into which the shipment is made.

The question, then, is whether that law was intended to prohibit the shipment when there was only a violation of the state law as to the manner of shipment, and there was no general prohibition in the state statute against the shipment of liquor into the state. In *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, Ann. Cas. 1917B 845, L. R. A. 1917B 1218, the plaintiff sought to compel the railroad company to transport a shipment of liquor from the state of Maryland to a point of delivery in the state of West Virginia, there being in force in the latter state at the time a prohibition law. In the course of the opinion in that case, and speaking with reference to the scope of the Webb-Kenyon act, it was said:

“Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means of subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt, and possession to be applicable and controlling irrespective of whether the state law did or did not

prohibit the individual use of liquor. That such also was the embodied spirit of the Webb-Kenyon Act plainly appears, since, if that be not true, the coming into being of the act is wholly inexplicable.

"The case in this court relied upon to establish the contrary (*Adams Exp. Co. v. Kentucky*, 238 U. S. 190, 59 L. Ed. 1267, L. R. A. 1916C 273, 35 Sup. Ct. Rep. 824, Ann. Cas. 1915D 1167), clearly does not do so. All that was decided in that case was that, as the court of last resort of Kentucky, into which liquor had been shipped, had held that the state statute did not forbid shipment and receipt of liquor for personal use, therefore the Webb-Kenyon Act did not apply, since it only applied to things which the state law prohibited. The leading state case cited is *Van Winkle v. State*, 4 Boyce (Del.) 578, 91 Atl. 385, Ann. Cas. 1916D 104. It is true in that case the state law prohibited shipment to and receipt of intoxicants in local-option territory, and if the Webb-Kenyon Law had been applied, there would have been no possible ground for claiming that the state prohibitions could be escaped because the liquor was shipped in interstate commerce. But the shipment was held to be protected as interstate commerce despite the state prohibition because the Webb-Kenyon Law was not correctly applied, for the following reason: Coming to consider the text of that law, the court said that as the Webb-Kenyon Act prohibited the shipment of intoxicants 'only when liquor is intended to be used in violation of the law of the state,' and as the liquor shipped was intended for personal use, which was not forbidden, therefore the shipment, although prohibited by the state law, was beyond the reach of the Webb-Kenyon Act. But we see no ground for following the ruling thus made, since, as we have already pointed out, it necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that act did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law.

"The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that if that act was within the power of Congress to

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adopt, there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the constitution; and this brings us to the last question, which is:

“4. Did Congress have power to enact the Webb-Kenyon Law?”

Then follows a discussion and holding which sustains the power of Congress to enact the Webb-Kenyon Law. From the excerpt quoted from that opinion, it appears that the movement of liquor in interstate commerce, which is prohibited by the state law, is divested by the Webb-Kenyon Act of its character as interstate commerce. The purpose of the act was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce “in states contrary to their laws.”

Under the doctrine announced in that case, we think that intoxicating liquor is divested of its character of interstate commerce by the Webb-Kenyon Act, where its shipment into the state violates the state statute as to the manner or conditions upon which such shipments may be made. The shipment here in controversy violated the section of the prohibition law which makes it unlawful for a railroad company, or other transportation company, to transport or convey intoxicating liquor into the state without having a permit issued by the county auditor “affixed in a conspicuous place to the parcel or package containing the liquor.”

The briefs in the case now before us were written and filed prior to the decision in *Clark Distilling Co. v. Western Maryland R. Co.*, *supra*, and we think the other questions presented are answered adversely to the appellant's contention in that case.

The judgment will be affirmed.

ELLIS, C. J., CHADWICK, MORRIS, and WEBSTER, JJ., concur.

## ON PETITION FOR REHEARING.

[*En Banc.* October 16, 1917.]

PER CURIAM.—Since the opinion in this case was filed, a petition has been presented by the appellant, in which complaint is made because the court did not consider more in detail two questions presented in the appellant's brief and upon the oral argument.

The first of these questions was whether the labeling, marking, and manner of transporting, handling, and delivering the liquor shipment in question was, or should be, regulated by §§ 238, 239, and 240 of the penal statutes of the United States, act of Congress of March 4, 1909, c. 321, 35 Stat. 1136 (U. S. Comp. St. 1916, §§ 10408, 10409, 10410), and whether, under § 8, article 1 of the United States constitution, the provisions of this statute were exclusive of legislation by the states upon the same subject.

The other contention was that, under § 17 of initiative measure No. 3 (Rem. Code, § 6262-17) and the permit issued by the county auditor, the shipment of liquor in question was a permitted one, and therefore a lawful shipment under the laws of the state of Washington, and was not subject to the provisions of the Webb-Kenyon act (act March 1, 1913, c. 90, 37 Stat. 699 [U. S. Comp. St. 1916, § 8739]).

We think both of these questions were sufficiently covered, though in general language, in the original opinion. That opinion was rested upon the recent decision of the Federal supreme court in the case of *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, Ann. Cas. 1917B 845, L. R. A. 1917B 1218. It was there held that the purpose of the Webb-Kenyon act was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce "in states contrary to their laws," and that the "regulation which the Webb-Kenyon act contains permits state prohibitions to apply to movements of liquor from one state into another."

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In this case, the liquor was seized under the provisions of the state law (initiative measure No. 3, Laws of 1915, chap. 2, p. 2; Rem. Code, § 6262-1 *et seq.*). Whether the Webb-Kenyon act repealed §§ 238, 239, and 240 of the Federal penal statutes is a question not necessary for us to determine, because, if the Webb-Kenyon act divested intoxicating liquor of its character as interstate commerce when it was brought into the state contrary to the laws thereof, it would seem to necessarily follow that it would be subject to the state laws, since it no longer had the character of interstate commerce.

Upon the last question above stated—that the shipment was a permitted one, because a permit had been issued by the county auditor, and was therefore not subject to the provisions of the Webb-Kenyon act—it may be said that, while the permit had been issued, it was not attached to the shipment, as required by § 18 of initiative measure No. 3 (Rem. Code, § 6262-18). Without a permit being affixed, as required by the statute, it would be a shipment contrary to the laws of the state, and its character as interstate commerce would thereby be divested. In our opinion, we may say again that the *Clark Distilling Co.* case is controlling.

The petition will be denied.

[No. 13911. Department Two. June 22, 1917.]

JAMES R. ORROCK, *Respondent*, v. SOUTH MORAN TOWNSHIP  
*et al.*, *Appellants*.<sup>1</sup>

HIGHWAYS—DEFECTS—INJURIES—LIABILITY OF TOWNSHIPS. Since townships organized under Const., art. 11, § 4, are, by Rem. Code, §§ 9322-9438, made bodies corporate, and vested with full control over highways to the exclusion of the county proper, with power to raise funds to keep them in repair, the township is liable for injuries caused by reason of the defective condition of its highways, under Rem. Code, §§ 950, 951, making counties, incorporated towns, school districts, and other public corporations, liable for "an injury to the rights of the plaintiff arising from some act or omission" of such public corporation.

STATUTES — TERRITORIAL LAWS — CONTINUATION BY CONSTITUTION. The territorial act, Rem. Code, § 951, making public corporations liable for torts, was continued in force by Const., art. 27, § 3, providing that all territorial laws not repugnant to the constitution shall remain in force until they expire by their own limitation or were altered or repealed by the legislature.

SAME—CONSTRUCTION—EXTENSION BY INFERENCE. The territorial act, Rem. Code, § 951, making public corporations liable for torts, is extended by inference to include townships, subsequently recognized as public corporations; since townships are a species of the genus municipal corporations, recognized by the constitution and laws.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered September 6, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through a defective highway. Affirmed.

*John B. White, William C. Meyer, and Fred J. Cunningham*, for appellants.

*Mark F. Mendenhall and Lloyd E. Gandy*, for respondent.

FULLERTON, J.—The plaintiff, James R. Orrock, received personal injuries by reason of the defective condition of a public highway upon which he was traveling. The highway

<sup>1</sup>Reported in 165 Pac. 1096.



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was outside of the corporate limits of any city or town, but was within the corporate limits of South Moran Township, Spokane county. He brought an action for damages, joining both the county and the township as defendants. The defendants filed separate demurrers, that of the township being overruled and that of the county sustained, and the action dismissed as to the latter. By leave of court, the defendant South Moran Township was permitted to file a special demurrer, as follows:

“Comes now the defendant, South Moran Township, a municipal corporation, and files a supplementary demurrer, specially demurring to the complaint of the plaintiff James R. Orrock on the grounds that the complaint does not state facts sufficient to constitute a cause of action against said defendant, for the reason that at common law a township corporation would not be liable for damages in such a cause of action, and could only be made liable therefor by the existence of some statute, and it will be contended upon the hearing of said demurrer, that there is no statute of the state of Washington making the said defendant liable as in said complaint alleged.”

This demurrer was overruled, and the parties went to trial, which resulted in a verdict and judgment in favor of plaintiff. The defendant appeals, assigning as error the overruling of the special demurrer.

The statutes of this state, relating to actions by and against public corporations (Rem. Code), read as follows:

“§ 950. An action at law may be maintained by any county, incorporated town, school district, or other public corporation of like character in this state, in its corporate name, and upon a cause of action accruing to it, in its corporate character, and not otherwise, in either of the following cases:

“(1) Upon a contract made with such public corporation;

“(2) Upon a liability prescribed by law in favor of such public corporation;

“(3) To recover a penalty or forfeiture given to such public corporation;

“(4) To recover damages for an injury to the corporate rights or property of such public corporation.”

“§ 951. An action may be maintained against a county, or other of the public corporations mentioned or described in the preceding section, either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation.”

In *Kirtley v. Spokane County*, 20 Wash. 111, 54 Pac. 936, we held, overruling a decision of the territorial court to the contrary, that, under these sections, a county was liable for injuries caused a traveler on the public highway by reason of the defective condition of a bridge. The principle of the case has been since approved in numerous decisions. *Lane v. Spokane Falls & N. R. Co.*, 21 Wash. 119, 57 Pac. 367, 75 Am. St. 821, 46 L. R. A. 153; *Rounds v. Whatcom County*, 22 Wash. 106, 60 Pac. 139; *Einseidler v. Whitman County*, 22 Wash. 388, 60 Pac. 1122; *Wendel v. Spokane County*, 27 Wash. 121, 67 Pac. 576, 91 Am. St. 825; *Lincoln County v. Fish*, 38 Wash. 105, 80 Pac. 435; *Redfield v. School District No. 3 of Kittitas County*, 48 Wash. 85, 92 Pac. 770; *Neel v. King County*, 53 Wash. 490, 102 Pac. 396; *Howard v. Tacoma School District No. 10*, 88 Wash. 167, 152 Pac. 1004.

Township organization was not known in this jurisdiction until the adoption of the state constitution. By § 4, art. 11, of that instrument, it is provided that the legislature, by general laws, shall provide for township organization, under which any county may organize whenever a majority of the qualified electors of such county voting at a general election shall so determine. The legislature first acted under the power in 1895 (Laws 1895, p. 472). The act, with the subsequent amendments, is found in Rem. Code, at §§ 9322-9438. Spokane county organized under the act in 1908. By the act, each township, when organized, becomes a body corporate with power to sue and be sued, to raise such sums of money

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for the repairs and construction of roads and bridges as they deem necessary, to acquire land containing beds of gravel or quarries of stone needed by the township for road construction, to have the charge of all highways and bridges in the township and the care and supervision thereof, to establish new highways and bridges wholly within the township; and generally they are given such supervision over their internal domestic affairs as is usually conferred on public corporate municipalities.

The foregoing, while not an enumeration of all of the powers conferred on township organizations, is enough to show that such organizations, as minor units of the county, are vested with full control of the highways within their jurisdictions to the exclusion of the county proper, with power to raise sufficient funds to keep such highways in repair. Being charged with the duty, they are, of course, liable for injuries arising from a neglect of the duty, and the appellant township is holden for the injuries suffered by the respondent from the defective way, unless some special reason exists exempting it from liability. Here but one such reason is assigned. The appellant calls attention to the rule existing in this state to the effect that the state, or a *quasi* municipal corporation of the state, is not liable for its torts unless the statute expressly makes it so liable, and contends that there is no such statute. It argues that the statute above cited has no application because it was enacted in territorial days, long prior to the enactment of the statute creating township organizations, and long prior even to the adoption of the constitution which authorized such organizations. But without following the argument by which this contention is sought to be sustained, we think it untenable. By § 3, art. 27, of the constitution, all laws in force in the territory of Washington which were not repugnant to that instrument remained in force until they expired by their own limitation or were altered or repealed by the legislature. This statute was not repugnant to the constitution, nor has it since expired by its

own limitation, nor has it been altered or repealed by the legislature. It is, therefore, a part of the existing statutes, as much so as it would have been had it been an enactment of the state legislature. It is a well settled rule "that a statute may include by inference a case not originally contemplated, when it deals with a genus within which a new species is brought by a subsequent statute." *State v. Cleveland*, 83 Ohio St. 61, 93 N. E. 467; *People v. Kriesel*, 136 Mich. 80, 98 N. W. 850. And see notes to these cases in 21 Ann. Cas. 1284, and 4 Ann. Cas. 5.

Endlich, in his work on the Interpretation of Statutes, at § 112, says:

"Except in some few cases where a statute has fallen under the principle of excessively strict construction the language of a statute is generally extended to new things which were not known and could not have been contemplated by the legislature when it was passed. This occurs, when the act deals with a genus, and the thing which afterwards comes into existence is a species of it."

There is no question that township organizations are a species of the genus municipal incorporations, existing and recognized by the constitution and laws. As such, it is liable under the statute for its torts.

The judgment is affirmed.

ELLIS, C. J., MOUNT, PARKER, and HOLCOMB, JJ., concur.

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Statement of Case.

[No. 13971. Department Two. June 22, 1917.]

E. A. SANBORN, *Respondent*, v. GRANT A. DENTLER,  
*as Guardian etc., Appellant*.<sup>1</sup>

**PLEADING—BILL OF PARTICULARS—EXCUSE—ABILITY TO FURNISH.** In an action for a physician's services, upon demand for a bill of particulars, an itemized statement of the value of the medicines furnished is not excused by an allegation in the amended complaint that the exact amount and fair value of medicines given at each visit could not be positively ascertained but aggregated in excess of \$500; and evidence thereof must be excluded, under Rem. Code, § 284, so providing in case of failure to furnish the bill of particulars.

**TENDER—DEPOSIT IN COURT—EFFECT.** In an action for the services of a physician, the defendant, by deposit in court of a sum of money admitted to be due, admits that the plaintiff was a qualified and licensed practicing physician, and cannot urge failure of proof in that regard.

**SAME.** A deposit in court, under Rem. Code, § 486, providing that, if plaintiff refuses to accept the sum in discharge of the action and shall not recover a larger amount, he shall pay all the costs that may accrue from the time of the deposit, is simply a provision for making tender after commencement of the action, and admits the amount due, with the same effect as a tender.

**WITNESSES—TRANSACTIONS WITH PERSON SINCE DECEASED OR INCOMPETENT.** In an action for a physician's services, original entries in the plaintiff's properly identified account book, containing memoranda as to diseases and conditions as they developed during the treatment, are not inadmissible as evidence of a party in interest as to a transaction had by him when suing a deceased or incompetent person, excluded by Rem. Code, § 1211.

**DEPOSITIONS—OBJECTIONS TO EVIDENCE—WAIVER.** Where defendant was present at the time of taking plaintiff's deposition and permitted entries from an account book to be read into the evidence without objection or demanding the annexation of the book to the deposition, he cannot object at the trial to the secondary nature of the evidence.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 26, 1916, upon the verdict

<sup>1</sup>Reported in 166 Pac. 62.

of a jury rendered in favor of the plaintiff for \$2,000 for services as a physician. Reversed, unless \$500 is remitted.

*Grant A. Dentler*, for appellant.

*Rickabaugh & McElroy*, for respondent.

HOLCOMB, J.—In this action respondent sued upon an account to recover \$3,500 for medical services and medicines furnished to Mr. and Mrs. Benjamin F. Woodman, citizens of Washington, while sojourning in the state of Massachusetts. A verdict was rendered for \$2,000. Motions for nonsuit at the conclusion of plaintiff's case and for a new trial after verdict were made and denied.

The services alleged to have been performed covered a period extending from about October 1, 1911, to April 7, 1912. Mrs. Woodman died about January 25, 1912, while being treated in Massachusetts, and shortly after, April 7, 1912, Mr. Woodman returned to Washington, and thereafter was adjudged to be insane and the appellant was appointed his guardian. This suit was instituted against the guardian of the estate of the insane person. Respondent alleged, in his original complaint, that the services were to be rendered and medicines furnished to Mr. and Mrs. Woodman under a sort of special employment by Mr. Woodman to render such services and attend to Woodman and wife at any and all times to the exclusion of all other business, and that such services were so rendered and medicines so furnished, and that, by reason thereof, the services were lumped in the sum of \$3,500, which was intended to cover all the physician's time, medicines furnished, and consultations. It was also alleged that respondent left a practice at Somerville, Massachusetts, and that the greater portion of the services rendered for Mr. and Mrs. Woodman were in the city of Boston, requiring much time in going to and from Somerville to attend the patients in Boston.

Shortly after the institution of this action, appellant deposited with the clerk of the court the sum of \$761.55, and

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notified respondent thereof, and that the same was deposited under the provisions of § 486, Rem. Code. Subsequently, appellant moved to require the respondent to make his complaint more specific, which motion the court granted. Respondent then served and filed an amended complaint, setting out in detail each and every visit made to Mr. and Mrs. Woodman and each and every other service performed and the value thereof, and set out in paragraph seven of the amended complaint a very long list of medicines alleged to have been furnished the patients; alleging therein that the exact amount of medicines given at each visit or its value cannot be positively ascertained, but that from two to six prescriptions for both Benjamin F. Woodman and his wife were made up from the medicines specified, and that the fair value of such medicines cannot be given for each visit, but would aggregate in excess of \$500, compounded and delivered. Appellant thereupon moved to strike or, in the alternative, to make more specific paragraph seven of the amended complaint by stating what medicine and the quantity thereof plaintiff furnished Benjamin Woodman and what medicine and the quantity thereof he furnished the wife of Benjamin Woodman upon each visit to them, and what was the fair and reasonable value of the medicine furnished at each such visit to either or both of them. This motion the court denied, and this is one of the errors relied upon by appellant.

It is contended by respondent that the requiring of a bill of particulars is a matter of discretion with the court, and that respondent was excused from furnishing the bill of particulars of these items under the allegation in connection therewith that the exact amount of medicine given at each visit, or its value, could not be positively ascertained, and that the fair value of such medicine given each visit could not be stated.

It is true that, in many cases, the requirement of a bill of particulars is a matter of discretion with the court; but under our practice, under Rem. Code, § 284, when an account is

sued upon, unless the party, within ten days after demand therefor in writing by the adverse party, shall deliver to the adverse party a verified bill of particulars of the items of the account, *he is precluded from giving evidence thereof*, and in case an itemized account stated is defective, the court may order a further account. It was shown at the trial that the respondent kept an account book with all his accounts shown therein, and that the particular items of account with Mr. and Mrs. Woodman were kept in that book in the ordinary course of business, together with other accounts, and all the items of the visits and memoranda as to the nature of the ailments with which the patients were suffering were kept therein. In *Plummer v. Weil*, 15 Wash. 427, 46 Pac. 648, we held that an allegation in connection with the bill of particulars, to the effect that it was impossible for the party relying thereon to comply with the order of the court any better than he had already done, or to make the bill of particulars any more specific on the points directed in the order of the court, furnished no excuse; and it was stated that the bill of particulars furnished was insufficient and "its insufficiency cannot be excused upon the ground that plaintiff kept no books and cannot specify the services or state their value. He assumed the burden of so doing when he brought his action in the present form. . . . 'The failure to keep an account of these services is the fault of the plaintiff, and he must suffer for it, if any one'."

Again, in *Moore v. Scharnikow*, 48 Wash. 564, 94 Pac. 117, it was said:

"In a mercantile account, or in any account which is made up of several and distinct items, it is proper for the court to require that the value of each article be separately stated. So also a physician, since he bases the value of his services on the number of visits made the patient or the number of prescriptions given him, may be required to set out in his bill of items the charge made for each visit, or each prescription."



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It certainly was as possible for respondent to itemize the quantity and value of the medicine furnished by him at each visit, when making his entries in his book, as it was for him to itemize the number and length of his visits, the nature of the other services performed by him, and the *kind* of medicines furnished. If he could not, he is the one who should suffer. Under the statute heretofore quoted, we think his evidence as to the amount and value of the medicines furnished should have been excluded for his failure to furnish, upon demand, a bill of particulars thereof.

There was no evidence furnished by respondent that he was, at the times mentioned in his amended complaint, a regularly qualified and practicing physician in the state of Massachusetts. For this reason, appellant claims that a nonsuit should have been granted, since it was necessary for respondent to prove his qualifications to practice in order to recover. Respondent testified by deposition that he had practiced in the state of Massachusetts something more than forty years. It is contended that, by the laws of Washington, respondent could not recover without proving that he was admitted and licensed to practice. While this may be true, it must be considered that appellant, by depositing a sum of money which he admitted to be due to respondent, admitted that respondent was entitled to recover something as a physician, having sued as a physician, and that appellant is not now in a position to urge that failure of proof.

In this connection it is contended by appellant that the deposit is not the same as a tender, in order to avoid the force and effect of the law relating to a tender as stated in *Young v. Borzone*, 26 Wash. 4, 66 Pac. 135, 421. There it was held that a plea of tender with payment into court conclusively admits plaintiff's cause of action as to the amount tendered. In what respect a deposit in court for the benefit of the plaintiff is different from a tender, appellant does not make entirely clear. The law provides that a tender, made before action, and the bringing of the amount of the tender

into court, entitles the defendant to recover all costs of suit, if the allegations in regard to tender be found true; and the statute, Rem. Code, § 486, requiring deposit in court, provides that the defendant in any action pending shall at any time deposit with the clerk of the court, for the plaintiff, the amount which he admits to be due, together with costs that have accrued, and notify the plaintiff thereof, and if plaintiff shall refuse to accept the same in discharge of the action, and shall not afterwards recover a larger amount than that deposited with the clerk, exclusive of interest and cost, he shall pay all costs that may accrue from the time such money was so deposited. This is simply a provision for making tender by paying into court after the action has been commenced, and by the terms of the statute itself, it amounts to an admission that there is the amount due that has been deposited. This has the same effect as a tender, strictly considered, of admitting that the plaintiff is entitled to recover in some sum. It does not admit that the contract is as alleged by plaintiff or that the basic measure of recovery is as alleged. *Young v. Borzone, supra*. This contention we consider untenable.

It is next contended that, under the provisions of Rem. Code, § 1211, excluding evidence of a party in interest as to any transaction had by him or any statement made to him when suing a deceased or insane person, all the evidence of appellant as to transactions between him and B. F. Woodman, the insane person, should have been excluded. The testimony of respondent was taken in Massachusetts by deposition. The testimony as to the nature of the employment of respondent was taken by depositions of other witnesses, and the evidence thereof given by respondent in his deposition was excluded at the trial. Respondent testified to his account book, and read therefrom the items of the account kept by him in the book. Appellant himself was there present, acting as attorney for himself and his ward. He conducted the cross-examination of the witness at the taking of the deposition.

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The deposition shows that he examined the book and questioned respondent as to certain entries he found therein, and during the cross-examination, the following questions and answers were made:

“Question: Doctor, you kept a book, didn’t you, of the visits and services? Answer: Yes. Q. And in testifying in your direct examination in reference to these services and what you did, you read from that book? A. Yes. Q. You have that book with you? A. Yes, right here. Q. And in that book you kept other accounts besides this? A. Yes. Q. And in direct examination you also read from certain memorandums as to the afflictions and diseases with which Mr. and Mrs. Woodman were suffering? A. Yes. Q. The memorandums were made at the time you observed the sickness? A. Yes. Not all at once, as there were conditions as they went along. Q. As the conditions developed you made additions? A. Yes.”

During the direct examination of respondent at the taking of the deposition, in answer to a question, he said: “These are the original entries from my book and I have a right to read these.” He then proceeded to read the items contained in his book.

It is thus shown that the book was properly qualified and would have been admitted in evidence under the rule announced by this court in *Ah How v. Furth*, 13 Wash. 550, 43 Pac. 639. Appellant, being there present at the taking of the deposition, made no objection to the reading of the contents of the book into evidence in the deposition, and did not call for the annexation of the book to the deposition as an original exhibit. At the trial, he objected to the reading of any of the answers given by respondent, and a great deal of the testimony given by respondent not constituting strictly the reading of entries found in the book was excluded, the court saying that the statute seemed to draw the line at anything that a deceased or insane person might dispute if living or sane. It is contended, however, that the court afterwards frequently permitted answers of the respondent to

questions which constituted, to a great extent, testimony as to transactions had by him with Mr. Woodman. Among other things, the following is complained of: Respondent was asked, "For what purpose did Mr. Woodman call at his office?" This was objected to at the trial on the ground that the plaintiff was disqualified to testify to any conversation or transaction with Mr. Woodman. The objection was overruled and the answer was read, as follows: "To get me to examine him and prescribe for him." The question then followed: "Did you make an entry in your book of that charge?" The answer was "Yes." This is the most nearly objectionable of any of the testimony of the respondent by deposition that was admitted by the court. This ruling was made by the court just prior to his ruling that nothing could be read and considered by the jury except the entries from the book testified to by the respondent. In view of this, we do not think it material, or that it probably influenced or prejudiced the jury in any way as evidence which they considered which was incompetent.

In the *Ah How* case, *supra*, it was held that the testimony of respondent, that he worked at the house of the intestate and as to the character of the work performed by him, was not testimony in relation to a transaction had by him with, or any statement made to him by, such intestate. "Such testimony related solely to acts of the witness alone and was entirely competent;" citing authorities. For the same reason, we consider that the testimony by deposition of this respondent, which was admitted, came within the same rule. These book entries, together with other corroborating testimony independent of the respondent's testimony, covered every material feature of respondent's case sufficiently to entitle him to recover something in his action.

Nor do we think that the objection of appellant to the testimony of respondent as to his book entries, by reading them into the deposition instead of producing the book, can now avail him. He stood by and permitted entries in the

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book to be read into the evidence at the taking of the deposition at a very great distance from the scene of the trial. If he had then objected to the secondary evidence or demanded the annexation of the book to the deposition, the question might have been obviated. The rule is well established that, if a party present at the taking of a deposition allows secondary evidence to be received without objection, he is precluded thereafter from raising such questions. 6 Ency. Plead. & Prac., pp. 588-599.

We find no other error in the record sufficient to justify a reversal, except the error as to the bill of particulars. That was a substantial and prejudicial error and would justify a reversal. We believe, however, that justice will be done to both parties if respondent be allowed to remit from the verdict the sum of \$500, covered by the paragraph in his complaint concerning the furnishing of medicines, and allow the recovery to stand for the remainder of \$1,500, with interest and the costs below:

It is therefore ordered that, if respondent shall remit the sum of \$500 from the recovery below, within thirty days, the judgment shall stand for the sum of \$1,500, with interest from June 26, 1916, and the costs in the court below. If respondent shall fail and refuse so to remit within the time specified, a new trial shall be granted. Appellant will recover costs of appeal.

ELLIS, C. J., MOUNT, PARKER, and FULLERTON, JJ., concur.

[No. 13995. Department Two. June 22, 1917.]

ABERDEEN CONSTRUCTION COMPANY, *Respondent*, v. THE  
CITY OF ABERDEEN, *Appellant*.<sup>1</sup>

CONTRIBUTION — COMMON LIABILITY — JOINT WRONGDOERS — NEGLIGENCE—ACTIONS—INSTRUCTIONS. In an action by a contractor against the city for contribution on account of damages paid to an employee for personal injuries sustained through the alleged defective plans and negligence of the city engineer, instructions are proper where they are to the effect that plaintiff cannot recover if plaintiff and the injured employee knew of the danger and assumed the risk; that, if the employee knew of the danger he assumed the risk and plaintiff could not recover; that, if the employee did not know of the danger, he could recover of his principal, but the principal could not recover from the city, where both the city and principal knew of the danger, since they were *in pari delicto*, and there can be no contribution between joint tort feasons.

Appeal from an order of the superior court for Grays Harbor county, Abel, J., entered July 1, 1916, granting a new trial, after the verdict of a jury rendered in favor of the defendant, in an action for contribution. Reversed.

*John C. Hogan* and *A. Emerson Cross*, for appellant.

*Ballinger, Battle, Hulbert & Shorts* and *Boner & Boner*, for respondent.

MOUNT, J.—This appeal is from an order of the lower court granting a motion for a new trial. The action was brought by the plaintiff to recover the sum of \$7,309, paid by the plaintiff to an injured employee. The action is based upon a complaint which is set out in *Aberdeen Construction Co. v. Aberdeen*, 84 Wash. 429, 147 Pac. 2, and need not be here restated. Upon that appeal, we held that the complaint stated a cause of action against the defendant. Thereafter the city filed an answer, which, after denying the material allegations of the complaint, alleged four separate affirmative defenses, to the effect: First, that the plaintiff was not

<sup>1</sup>Reported in 165 Pac. 1058.

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liable to the injured employee, and therefore the payment which the plaintiff made to the employee was made voluntarily and gratuitously; second, that the injuries which the employee received were caused by his own carelessness and negligence, and that he assumed the risk of such injury; third, that the city never assumed or exercised any right or authority over the plaintiff under the contract, and that the plaintiff, in the performance of the contract, exercised an independent employment and pursued its own methods not subject to the control of the city or its engineers; that the injury to the employee did not result from any vice of the contract, and was not due to any defective plans or specifications or to any direction of the city engineer pursuant to which the defective work was done; and, lastly, that the plaintiff was aware of the condition of the earth embankment at the time the employee was injured, and that the dangers from the embankment were open and apparent to the plaintiff and to the injured employee and that both were negligent, and their negligence was the sole cause of the injury. Upon the issues made by the complaint and answer and reply, the cause was tried to the court with a jury. At the conclusion of the trial, the jury returned a verdict in favor of the defendant. The plaintiff thereupon moved for a new trial, and the motion was argued to Judge Irwin, who took it under advisement, but died before disposing thereof. Afterwards, the motion for a new trial was argued to his successor, and was sustained by an order, as follows:

“It is ordered by the court that said motion for new trial be granted solely upon the ground of error in the giving of instructions to the jury on the trial of said cause, to which exceptions were duly taken by plaintiff, and said motion is hereby denied upon all other grounds set forth in said motion for new trial, to which ruling of the court granting said motion for new trial defendant excepts and its exception is allowed, and to which ruling of the court refusing to grant such motion for new trial on other grounds, plaintiff excepts and its exception is allowed.”

The instructions referred to in this order are as follows:

"No. 2. You are instructed that, if you believe from a preponderance of the evidence, that the plaintiff construction company was engaged in grading streets in the city of Aberdeen under a contract with the city, and that the man Brockett was engaged on the work and while so engaged a portion of the finished side of the street under the construction work caved in and injured him, and that the caving in was owing to the embankment on the finished side of the street being too precipitous, and that it was so graded and finished under the instruction and direction of the city engineer, and if you further believe that the bank was such that the engineer knew or should have known, with the exercise of reasonable care and diligence in that regard, that the same was dangerous and was liable to slide, and that the man Brockett and the plaintiff construction company, or either of them, did not know that it was dangerous and liable to slide, then the plaintiff would be entitled to recover what would have been a reasonable compensation to Brockett for the injury sustained."

"No. 3. On the question of contributory negligence of the man Brockett and the plaintiff, the construction company, or either of them, you are instructed that if Brockett or the construction company, either one, was guilty of negligence and carelessness which materially contributed to the accident which caused the injury to Brockett, then the plaintiff is not entitled to recover anything in this action; and on the question of whether either Brockett or the plaintiff was guilty of negligence and carelessness themselves, you should take into consideration whether or not it was negligence or carelessness on the part of Brockett to sit on the wagon when it was being loaded, and as to whether or not he had been warned not to sit there, and as to whether or not Brockett or the construction company, either one—and in that regard the president of the construction company, Andrew Peterson, and Carl Gylling, the superintendent of the construction company on the work, and Oberg, the foreman, or either one of them, must be considered as the representative of the construction company—knew that the bank where Brockett was working was dangerous and liable to cave in, then it would be contributory negligence on the part of Brockett to work under such conditions, and it would also be contributory negligence on the



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part of the construction company to permit him to work under such condition, and if the likelihood of the caving in of the bank was open and apparent to any person working in the vicinity, and was open and apparent to Brockett or the construction company or the officers of the construction company, then they would assume the risk of working in such dangerous place, and the plaintiff would not be entitled to recover: . . . .”

“No. 7. I instruct you that, even though you should find that Brockett was entitled to recover from the Aberdeen Construction Company, it does not follow, as a matter of law, that the Aberdeen Construction Company is entitled to recover anything from defendant, city of Aberdeen; that even if the Aberdeen Construction Company, under these instructions, was liable to Brockett, yet the Aberdeen Construction Company could not recover from the city of Aberdeen anything in this action unless you are satisfied by a preponderance of the evidence that the injuries which said Brockett received were caused by defective plans and specifications or the carelessness and negligence of the city engineer of the city of Aberdeen in directing the manner in which a finished bank was sloped and that it was a portion of the finished bank that caved in and caused injuries to said Brockett; and you further find that the dangers of such bank caving in were known, or by the exercise of ordinary care should have been known, by the city engineer of the city of Aberdeen and was unknown to the plaintiff or its representatives in charge of the work.”

It will be noticed that instruction No. 2 told the jury, in substance, that the construction company—the plaintiff—cannot recover unless the city engineer knew, or should have known, that the bank was dangerous and liable to slide, and also that Brockett and the plaintiff, or either of them, did not know that it was dangerous and liable to slide.

By instruction No. 3, the jury was told that, if either Brockett or the construction company knew the bank was dangerous and liable to cave in, then they were both guilty of contributory negligence and the construction company could not recover from the city, and also that, if the likeli-

hood of the bank caving in was open and apparent to Brockett or the construction company, then they assumed the risk and the construction company could not recover.

By instruction No. 7, the jury was told in substance that, even though the accident was caused by defective plans and specifications, or the carelessness or negligence of the city engineer in directing the manner in which the finished bank was sloped, and the dangers of such bank caving in were known, or by the exercise of ordinary care should have been known, by the city engineer, still the construction company could not recover unless such dangers were unknown to said company or its representatives in charge of the work.

It is argued by the respondent that these instructions were erroneous because the law of the case was settled upon a consideration of the sufficiency of the complaint when the case was before us in 84 Wash. 429, *supra*. The principal question upon the consideration of the sufficiency of the complaint was whether the appellant and respondent, as shown by the complaint, were joint tort feasons. We there said, at page 433:

“The principal question before us is whether appellant and respondent were joint tort feasons, and, if so, whether appellant stands in such a relation to respondent with reference to the facts involved as will preclude it from obtaining contribution. The doctrine announced in *Alaska Steamship Co. v. Pacific Coast Gypsum Co.*, *supra*, upon which appellant relies, is sufficient to sustain its contention. Conceding that appellant and respondent are joint tort feasons, it is a well-recognized principle of law that, to preclude appellant from recovering, it and respondent must stand *in pari delicto*.”

Then, after quoting from *Lowell v. Boston & L. R. Corporation*, 23 Pick. 24, 34 Am. Dec. 33, we continued:

“The facts pleaded in this case show that the defective plans and specifications were adopted by respondent, and that the appellant contracted to do the work in accordance therewith under the direction and supervision of the city engineer. This contract imposed an obligation to do the work

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in the manner required. This appellant did. In the absence of any stipulation in the contract that appellant warranted the sufficiency of the plans and specifications, no such warranty can be imputed to it. We in substance so held in *Huetter v. Warehouse & Realty Co.*, 81 Wash. 331, 142 Pac. 675. No such warranty by appellant has been called to our attention. It necessarily follows that the sufficiency of the plans and specifications was warranted by the city. To now hold, as a matter of law, that appellant, in performing its contract in accordance with such plans and under the direction of the city engineer, was in equal fault with the respondent or was guilty of negligence as between it and respondent, would be unjust. The only wrong charged against appellant as between it and its employes involved no moral delinquency or turpitude, nor was its offense one that can be considered a *malum prohibitum* or immoral in any respect. It therefore should not be held to be against the policy of the law to inquire into the relative delinquency of appellant and respondent.

“Assume that respondent had let the contract to an individual instead of the appellant corporation, and that such individual had been doing the work personally in accordance with the plans and specifications under the direction of the city engineer, and upon his assurance that the banks were free from danger, and assume that the contractor had been injured by the bank falling upon him; it would hardly be contended as a matter of law that he could not recover damages from the city. At most, under such circumstances, the questions whether he assumed the risk or had been guilty of contributory negligence would be issues of fact which should be submitted to the jury. While it must be conceded that, as between it and its employee, appellant was guilty of negligence in failing to furnish the employee a safe place in which to work, it would seem that, as between it and the respondent municipality, it should not be held guilty of negligence, as a matter of law, in performing the work in exact compliance with the defective plans and specifications and under the supervision of the city engineer.”

All that was then said was based upon the allegations of the complaint, which were taken as true. The complaint alleged that the whole fault was the fault of the plans made by

the city and adopted by the city. It was alleged that the plaintiff was free from fault. Upon these allegations, the complaint was held sufficient. An answer was afterwards filed, and this answer alleged that the whole fault was the fault of the plaintiff, and that whatever sum it paid to this injured employee was by reason of the fault of the plaintiff, so that, when the case was tried upon the issues joined, the question was not of equal fault, but was whether the plans were defective and the injury was caused solely thereby, or whether the plaintiff was wholly at fault in the injury which occurred to its employee. So that the question of comparative negligence, or equal negligence, was not in issue in the case. That question was presented in the case, which was here upon a demurrer to the complaint, only because it was contended that the complaint showed that the parties—the city and the contractor—were each guilty of negligence, and upon that question the discussion was made in the opinion which we have quoted hereinbefore. We there held that the complaint was sufficient because it did not show that the parties were *in pari delicto*. We think the instructions do not violate the rule there stated, because they tell the jury in substance that, if the parties were equally guilty of negligence, there can be no recovery by one against the other. The injured employee of the plaintiff stood in the same position as the plaintiff itself, and in the assumption which was made in that case to the effect that, if the work had been let to an individual, and, upon the assurance of the city that the banks were free from danger, the individual had been injured by the bank falling upon him, it would hardly be contended, as a matter of law, that he could not recover for the injury. We said:

“Whether he assumed the risk or had been guilty of contributory negligence would be issues of fact which should be submitted to the jury.”

It seems clear that the plaintiff in this action may not recover for the injury to the employee if the plaintiff and the injured employee knew of the danger and assumed the risk.

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If the plan for doing the work was inherently dangerous, and the plaintiff undertook to do that work knowing of the danger, clearly it could not recover from the city for an injury received by it. If an employee of the plaintiff, knowing the danger, was injured, he would clearly assume the risk the same as his principal. If the employee did not know the danger, he could recover from his principal, and his principal could not recover from the city, because both the city and the plaintiff, both knowing the danger, would be *in pari delicto*. If the city and the construction company were *in pari delicto*, it does not follow that an injured employee, who did not know of the danger, could not recover from his principal. This, we think, is conclusive of the question presented upon these instructions. We are satisfied they correctly presented to the jury the law of the case and that, as between the plaintiff construction company and the city of Aberdeen, they were proper instructions. We conclude, therefore, that the trial court was in error in granting a new trial.

The order is therefore reversed, and the cause remanded with instructions to enter a judgment upon the verdict.

ELLIS, C. J., PARKER, and HOLCOMB, JJ., concur.

[No. 14042. Department Two. June 22, 1917.]

FRED L. SOWLES *et al.*, Appellants, v. W. W. FLEETWOOD  
*et al.*, Respondents.<sup>1</sup>

**SALES—RESCISSION—FRAUD.** Upon the sale of the furniture and good will of a hotel business, false representations as to the value of the business and the amount of monthly profits, peculiarly within the knowledge of the seller, and inducing the sale, may be relied upon by the purchaser, notwithstanding an inspection of the furniture which was also overvalued.

**SAME—FRAUD—RATIFICATION—REMEDIES OF VENDEE—LACHES.** The purchaser of the furniture and good will of a hotel business may retain the benefits of the contract and make defense to an action on the purchase money notes, commenced nine months later, without being guilty of laches precluding the defense of fraud in misrepresentations inducing the sale.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered January 11, 1916, upon findings in favor of the defendants, in an action on promissory notes and to foreclose a chattel mortgage, tried to the court. Affirmed.

*Thomas M. Vance and Parr & Marts*, for appellants.

*R. H. Fry and Troy & Sturdevant*, for respondents.

**PARKER, J.**—The plaintiffs, Sowles and wife, commenced this action in the superior court for Thurston county, seeking recovery upon two promissory notes and the foreclosure of a chattel mortgage securing the same, executed by the defendants Fleetwood and wife. The notes evidence a debt for a balance of \$1,500 due upon the purchase price of the furniture and good will of the Willard Hotel, a rooming house in Olympia which had been purchased by the defendants from the plaintiffs. The defendants admit the purchase of the business and the execution of the notes and mortgage for the balance of the purchase price, but defend against re-

<sup>1</sup>Reported in 165 Pac. 1056.

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covery thereon by claiming damages in the sum of \$2,000 resulting to them from false and fraudulent representations made to the defendants inducing them to purchase the business. Trial in the superior court upon the merits resulted in judgment and decree in effect awarding the defendants damages against the plaintiffs in the sum of \$1,500, offsetting the balance due upon the purchase price, and cancelling the notes and mortgage. From this disposition of the case, the plaintiffs have appealed to this court.

For several years prior to January, 1915, appellants owned the furniture and good will of the Willard Hotel, occupying a building under a lease. While the property was evidently community property, the business was under the management and control of Mrs. Sowles. Early in January of that year, negotiations were commenced between respondents and Mrs. Sowles looking to the purchase of the business by respondents. Respondents, up to that time, had been farmers and were wholly inexperienced in the hotel business, of which fact Mrs. Sowles was fully aware at the time she was dealing with them. Mrs. Sowles asked \$2,500 for the business. Respondents, after looking at the rooms and furniture, expressed themselves as considering the price too high. This belief on their part was manifestly because of their view of the value of the furniture. Mrs. Sowles told them that the business was worth all that she was asking for it and that she had two offers of \$2,000 for the business, one of which she told them was a standing offer, naming the persons who she claimed made such offers. She also told them that the business had been, and was then, making \$200 per month clear. Relying upon these representations, respondents consummated the purchase on January 16, paying Mrs. Sowles \$1,000 in cash and executing the notes and mortgage above mentioned for the balance of \$1,500.

The evidence is not free from conflict, but we think it fully warrants the conclusion that these statements were made by Mrs. Sowles, that they were false, that they were made with

the intention of having respondents rely thereon, and to induce them to purchase the business. We think, also, that the evidence warrants the conclusion that respondents did rely upon these statements of Mrs. Sowles and that they were induced thereby to purchase the business, and that they did not have readily at hand any means of ascertaining their falsity. That they were statements of fact the truth or falsity of which were peculiarly within the knowledge of Mrs. Sowles is, of course, evident. The evidence is all but conclusive that the furniture was not worth over \$500, and if the statements of Mrs. Sowles touching the value of the business related only to the value of the furniture, respondents might not be permitted to complain, in view of their inspection of the furniture before the purchase, but manifestly the good will and earning power of the business as an established business, as represented by Mrs. Sowles, was the real inducement leading respondents to purchase it at the price of \$2,500. The evidence, we think, also warrants the conclusion that the total value of the furniture and business in no event exceeded \$1,000, the amount paid in cash by respondents upon the purchase price. This manifestly, in substance, is the view of the evidence taken by the learned trial judge, and we think that he was fully warranted in so viewing it. We think it would be unprofitable to discuss the evidence in detail here. With these facts before us, the law of the case seems a simple matter, in view of our repeated decisions, and plainly calls for an affirmance of the judgment rendered by the trial court. *Stewart v. Larkin*, 74 Wash. 681, 134 Pac. 186, L. R. A. 1916B 1069; *Duffy v. Blake*, 80 Wash. 643, 141 Pac. 1149; *Christensen v. Koch*, 85 Wash. 472, 148 Pac. 585; *George v. Kurdy*, 92 Wash. 277, 158 Pac. 965.

Some contention is made in appellants' behalf that respondents should be held to have affirmed the contract and waived any remedy they might have as against appellants, because of lapse of time and their continuance in possession of the business. We have seen that the sale was consummated on



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January 16, 1915. This action was commenced in August of the same year shortly after the maturity of the notes. It was then, for the first time, that respondents asserted their claim of damage. It is possible that there was such a lapse of time as would have prevented respondents from rescinding the sale and seeking relief in equity to that end, but we are to remember that respondents' claim made in this action is in effect a suit for damages on their part, and the fact that it is invoked by way of set-off or counterclaim in this equitable foreclosure action does not change its nature so far as their right to assert it is concerned. Viewed as such, manifestly it was brought within the period prescribed by law. It seems plain, therefore, that their right to so assert their claim for damages is not lost by lapse of time, whatever may be said of their right to rescission. In *Pronger v. Old Nat. Bank*, 20 Wash. 618, 56 Pac. 391, Judge Fullerton, speaking for the court, said:

"Nor does an affirmance of the contract after discovery of the fraud extinguish the right to an action for damages on account of the fraud. An affirmance bars only the right to rescind. All other remedies remain unimpaired."

In *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180, Judge Hadley, speaking for the court, said:

"Ordinarily it is the injured party who seeks a rescission. He may pursue either the equitable remedy of rescission, and offer to place the other party *in statu quo* by tendering back the benefits of the contract, or he may retain the benefits of the contract and bring his action at law for his damages."

We conclude the judgment must be affirmed. It is so ordered.

ELLIS, C. J., MOUNT, HOLCOMB, and FULLERTON, JJ., concur.

[No. 13947. Department One. June 29, 1917.]

MRS. PATRICK MULLINS *et al.*, *Respondents*, v. ALVEOLAR  
DENTAL COMPANY *et al.*, *Appellants*.<sup>1</sup>

PHYSICIANS AND SURGEONS—DENTISTS—DEFECTIVE WORK—LIABILITY. A dentist is liable for damages for pain and suffering caused a patient by defective and unsanitary sets of teeth which did not fulfill the representations and warranty made by him.

PLEADING—ISSUES AND PROOF. Failure of proof as to some items of the complaint does not affect the right to a recovery for others.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 11, 1916, upon findings in favor of the plaintiffs, in an action for damages, tried to the court. Affirmed.

*John F. Murphy*, for appellants.

*Philip Tworoger*, for respondents.

CHADWICK, J.—The respondent, Mrs. Patrick Mullins, was attracted by an advertisement of the appellant Alveolar Dental Company, of which appellant R. T. Royal is manager, and contracted with it to make for her a set of upper and lower teeth according to a peculiar process or system of which the company claims to be proprietor. The contract price for the work was \$280. Mrs. Mullins paid \$100 at the time of entering into the contract and \$180 when the work was finished. The work was guaranteed to be satisfactory and to give satisfaction during the term of the life of the patient. The process employed by the dental company is to make a set of teeth without plates and to fasten it to such teeth or roots of teeth as may be in the mouth. Instead of bridging the intervening spaces, the structure is supported by resting it upon what is called a saddle, which fits closely over and along the alveola ridge, with a concave surface.

<sup>1</sup>Reported in 166 Pac. 65.

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When the work was completed, Mrs. Mullins objected to it as unsightly, but was persuaded by the manager of the company that everything would be all right when she had accustomed herself to the use of the teeth. She returned to her home at North Yakima. After a few weeks, the teeth became loosened from their supports. In the meantime she had suffered great pain and had been reduced to an extremely nervous condition and was unable to attend to her household duties. She again came to Seattle, where appellants removed the upper teeth. Without relating the intervening details, Mrs. Mullins went to another dentist, who removed the lower set of teeth, allayed the inflammation in the gums, and made for her upper and lower teeth according to the methods more generally employed in the profession of dentistry. Mrs. Mullins brought this action, her husband joining, to recover the amount paid for the work, and damages for pain and suffering. After a trial by the court without jury, findings were made allowing \$280, the amount paid by Mrs. Mullins, and \$70 general damages.

It is contended that the testimony does not support the findings. We think the testimony is ample to show that the work did not meet the representations of the defendants; that the teeth were unsatisfactory and unsightly, and by reason of the fact that the saddle fits down closely upon the alveola ridge, allowing food to accumulate which could not be readily removed, thus causing fermentation and irritation and the breath to become fetid and foul, unsanitary.

But it is contended that, in any event, respondents are not entitled to recover for pain and suffering. If the testimony of the respondent Mrs. Mullins is to be believed, and we find no reason in the record for disbelieving it, we think that the trial judge was well within the bounds of moderation when he fixed the sum of \$70 as general damages. We find no reason for disallowing this item of damages.

Appellants contend that respondents have been permitted to recover upon a theory not advanced or set out in their

complaint, and cite authorities holding that this will not be permitted. It may be true that respondents failed in their proof with reference to some particular item suggested in the complaint, but they sustain the complaint in all other things and were entitled to recover. The testimony is, of course, conflicting, but we think it preponderates in favor of respondents.

The judgment is affirmed.

ELLIS, C. J., MORRIS, MAIN, and WEBSTER, JJ., concur.

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[No. 14157. Department One. June 29, 1917.]

THE STATE OF WASHINGTON, *on the Relation of Ada A. Stone,*  
*Plaintiff,* v. THE SUPERIOR COURT FOR SPOKANE  
COUNTY, *Respondent.*<sup>1</sup>

TRIAL—CHALLENGE TO THE EVIDENCE—QUESTION FOR COURT. A motion to discharge the jury and enter judgment for the defendant, upon challenging the sufficiency of plaintiff's evidence, presents an issue of law and not of fact, for the court.

MANDAMUS—WHEN LIES—TO COURT—REMEDY BY APPEAL. Mandamus lies to compel a superior court judge to enter a judgment of dismissal, after sustaining a challenge to the sufficiency of the evidence; under Rem. Code, §§ 1014 and 1015, providing that the writ shall issue to compel the performance of a legal duty when there is no plain, speedy, and adequate remedy in the course of law.

TRIAL—CHALLENGE TO THE EVIDENCE—RIGHT TO DISMISSAL—MISTRIAL. Upon sustaining a challenge to the sufficiency of the plaintiff's evidence as to one of the defendants, nothing remains to be done but to dismiss such defendant from the case, and a subsequent mistrial as to the remaining defendant does not affect the rights of such defendant to a dismissal.

Application filed in the supreme court April 20, 1917, for a writ of mandamus to compel the superior court for Spokane county, Webster, J., to enter a judgment of dismissal. Granted.

<sup>1</sup>Reported in 166 Pac. 69.

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Opinion Per MAIN, J.

*Nuzum, Clark & Nuzum*, for relator.

*W. B. Mitchell and Skuse & Morrill*, for respondent.

MAIN, J.—This is an original application in this court for a writ of mandamus, directed to the Honorable R. M. Webster, one of the judges of the superior court for Spokane county.

The facts, as shown by the admitted portions of the petition and the reply thereto, are these: On the 22d day of March, 1907, there came on for trial before Judge Webster and a jury an action in which Sarah Enright was plaintiff and Henry Madigan and Ada Stone Bringgold were defendants. The complaint in that action alleged a conspiracy on the part of the defendants to slander the plaintiff. After the plaintiff had closed her case in chief, the legal sufficiency of the evidence as to the defendant Mrs. Bringgold was challenged, and the court was moved to discharge the jury and enter a judgment in her favor for the reason that there was no evidence from which the jury could find that she had been a party to the conspiracy charged. After argument, this motion was sustained by the court. Thereafter the cause proceeded against Madigan, the other defendant, and during a subsequent period in the trial, it was brought to the attention of the trial judge that there had been certain misconduct on the part of one of the jurors. For this reason, the procedure of the trial was arrested and the jury discharged. A few days after the discharge of the jury, the court was requested to enter a judgment dismissing the action as to Mrs. Bringgold, which request was denied because, as recited in the return, "there was a mistrial of said cause, and on account thereof respondent as judge of said court has refused to enter any judgment of dismissal as to said defendant Ada Stone Bringgold." The present application is to require the trial judge to sign the judgment dismissing the action as to Mrs. Bringgold, and presents the question whether, as a matter of law, under the facts stated, she was entitled to such judgment.

Where a cause is being tried to a jury and, at the conclusion of the plaintiff's case, there is a challenge to the sufficiency of the evidence and a request for the discharge of the jury and the entry of a judgment in favor of the defendants, a vital issue of law, not of fact, is presented to the trial court for determination. *Bee Bldg. Co. v. Dalton*, 68 Neb. 38, 93 N. W. 930.

After the challenge to the sufficiency of the evidence has been sustained, even though no formal judgment has been entered from which an appeal could be prosecuted, the plaintiff cannot thereafter take a voluntary nonsuit. In *Dunkle v. Spokane Falls & N. R. Co.*, 20 Wash. 254, 55 Pac. 51, the plaintiff having introduced his evidence and rested, the defendant submitted a motion to discharge the jury and for judgment. After argument, the motion was granted, and thereupon the plaintiff moved to dismiss the action without prejudice, which, in effect, was a motion for a voluntary nonsuit. It was there said:

"We are agreed that at any time prior to an adverse decision upon such a motion, the plaintiff has the right to dismiss his action, but, when he elects to submit the motion for judgment to the determination of the court, he must take his chances upon such determination, and a subsequent application to dismiss comes too late."

A writ of mandamus will issue from this court to the superior court to compel the latter to perform a legal duty when there is not a plain, speedy and adequate remedy in the course of law. Rem. Code, §§ 1014 and 1015; *State ex rel. Gabe v. Main*, 66 Wash. 381, 119 Pac. 844.

In the present case, the trial judge, as shown by his return, refused to sign the judgment of dismissal as to Mrs. Bringgold because the misconduct of a juror had resulted in a mistrial, apparently entertaining the view that, there being such a mistrial, the action must be retried as against both of the defendants. The cause as to Mrs. Bringgold was submitted to the court upon the merits on an issue of law when

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the challenge to the sufficiency of the evidence was interposed. After that motion was decided in her favor, she had no further connection with the case. The only thing that remained to be done, so far as she was concerned, was the signing of a formal judgment which would dismiss her out of the action. It was the duty of the court to so dismiss her, and to require the performance of this duty, the writ of mandamus is the proper remedy, as above seen, providing there is not a plain, speedy and adequate remedy by appeal. If the retrial should proceed against both of the defendants, presumably the transcript of the evidence upon the former trial would not be used, but the evidence would be again taken in court. The evidence upon the first trial might not be sufficient to sustain a verdict against Mrs. Bringgold, while that upon the second trial would be sufficient. If the judgment requested should be entered, the plaintiff would have a right to appeal therefrom and have the correctness of the ruling reviewed. If, upon the second trial, Mrs. Bringgold should be again dismissed out of the action, the plaintiff would have a right to appeal from that judgment. If, upon such an appeal, this court should be of the opinion that the evidence was sufficient to carry the question to the jury, it would be returned for new trial after, upon the former trial, she had been dismissed out of the action upon the record, which neither party could get before this court unless the trial court signs the judgment requested. Under this situation, it cannot be said that the remedy by appeal is adequate. It must be remembered that this is not a case where the trial judge, after having announced a decision sustaining a challenge to the sufficiency of the evidence, subsequently concluded that he had fallen into error and, for that reason refused to sign the judgment of dismissal. Neither is it a case which involves any element of discretion on the part of the trial judge. The case involves a pure question of law as to whether, as a matter of legal right, Mrs. Bringgold was entitled to a formal judgment of dismissal.

There is a line of cases cited in the brief of the attorneys for the relator which hold that, in an action tried to a jury, where, at the conclusion of the plaintiff's case, the defendant moves for a nonsuit, or challenges the legal sufficiency of the evidence and asks the discharge of the jury, and the motion or challenge so made is denied and the cause proceeds, and subsequently a mistrial occurs, the defendant does not have a right to appeal and have reviewed the order of the court directing a retrial, or the decision of the court upon the motion which questions the sufficiency of the evidence to take the case to the jury. To this class belongs the case of *Dossett v. St. Paul & Tacoma Lumber Co.*, 28 Wash. 618, 69 Pac. 9. There, a motion for nonsuit was made and overruled. The trial proceeded by the introduction of the testimony of the defendant, and was submitted to the jury and resulted in a mistrial on account of the inability of the jury to arrive at a verdict. The appeal was there taken from the order directing a retrial, and it was there held that such an order was not the granting of a new trial and, therefore, not appealable, but the holding in that case would not support a denial of the writ in this case. Here, as already stated, Mrs. Bringgold, by her challenge to the evidence, presented to the court a vital issue of the law which was decided in her favor, and the only reason that the court declines to enter the formal judgment is because of a misapprehension as to the legal effect of the subsequent mistrial as against the other defendant. It is undoubtedly the rule that the law does not favor the appeal of cases by piecemeal, but this rule is not applicable to the facts in this case.

The writ will issue.

ELLIS, C. J., HOLCOMB, and PARKER, JJ., concur.



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Opinion Per MORRIS, J.

[No. 14087. Department One. June 30, 1917.]

M. J. DROPPELMAN, *Appellant*, v. PORT OF SEATTLE,  
*Respondent*.<sup>1</sup>

MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTS—CONSTRUCTION—DEMURRAGE—DEFENSES. A contractor for port terminals cannot escape the payment of demurrage for delay caused by another contractor, where the contract signed by him provided that the port should not be answerable to one contractor for any damage or loss suffered through the fault of any other contractor, and it is immaterial that such clause was not in the specifications upon which he submitted his bid.

SAME. A contractor for port terminals cannot escape the payment of demurrage for delay caused by the unwarranted rejection of material by an inspector, where he had signed an agreement with the port in settlement of the matter expressly declaring that the port was not responsible for the delay.

SAME. Where, upon a dispute as to demurrage due from a contractor for port terminals, the parties agreed upon the stipulated damages to that date, in order to enable the contractor to go ahead with the work, payments thereafter made on the contract do not waive the demurrage then agreed upon.

SAME — DEMURRAGE — DELAY — EVIDENCE. Upon an issue as to whether a contractor was responsible for delay whereby demurrage attached, the evidence of a former engineer who had resigned, to the effect that he would have advised waiver of the demurrage, on a "broad basis of general human fairness," is immaterial, especially where his testimony indicates that the contractor was responsible for the delay.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 15, 1916, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

*Tucker & Hyland*, for appellant.

*C. J. France*, for respondent.

MORRIS, J.—In May, 1913, Hans Pederson entered into a contract with the port commissioners to erect the superstruc-

<sup>1</sup>Reported in 166 Pac. 248.

ture of the Smith Cove terminal. The contract provided that the work was to be completed in two hundred and ten days from the date of notification to commence work, and in case not so completed, the contractor agreed to pay as liquidated damages \$100 for each day the completion was delayed beyond the two hundred and ten days. Pederson was notified to commence work June 2, 1913, and his time within which to complete the contract expired December 29, 1913. The work was not completed until August 5, 1914. On March 10, 1914, the work was approximately only sixty per cent completed, and Pederson was one hundred and fifty-five days behind in his contract. To settle any dispute as to the cause and responsibility for this delay, the following contract was then entered into:

"This memorandum of agreement entered into this 10th day of March, 1914, between the port commission of the Port of Seattle, party of the first part, and Hans Pederson, the contractor, party of the second part;

"Witneseth: That, whereas, under date of May 28, 1913, the port commission entered into a contract with the contractor for furnishing all material and performing all labor for the Smith Cove Improvement, subdivision No. 2;

"Whereas, the work so to be performed has not been performed within the time fixed in the contract for the performance of the same and a dispute has arisen between the port commission and the contractor as to the responsibility for such delay, the contractor not claiming that the delay is due to the port, but that it is due to causes which, under the terms of the contract, excuse him for the delay, and the port commission claiming that the contractor alone is responsible for the delay;

"It is now agreed between the port commission and the contractor as follows:

"First—That the period of delay in dispute is thirty days and the liquidated damages therefor is three thousand dollars.

"Second—That the contractor shall proceed with the work under the contract, and the time for the completion of the contract is hereby extended up to and including the thirtieth day after the work on said improvement under subdivision one shall be completed.

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“Third—That the sum of three thousand dollars shall be deducted from the estimate now about to be paid, the date of said estimate being February 28, 1914, and the amount thereof \$21,663.13, and that said sum of three thousand dollars shall be retained by the port commission until the final settlement with the port commission under said contract, at which time the matter shall be determined between the port commission and the said contractor as to the cause of the delay, as aforesaid, and if it shall be determined that the contractor is responsible for such delay, the port commission shall retain such sum of three thousand dollars out of such final settlement, otherwise it shall be included in such final settlement with the contractor.

“Fourth—Nothing herein contained shall impair other provisions of the contract or affect the rights or remedies of the port under the contract as the work shall proceed.”

After the completion of the contract, Pederson presented a claim to the port commissioners for \$3,000, claiming he was in nowise responsible for the delay. The claim was denied, Pederson assigned his interest therein to appellant, and this suit was commenced. The lower court found that Pederson was responsible for delay in excess of thirty days prior to March 10th, and denied recovery.

Appellant's first contention is one of fact, claiming that, under the evidence, the delay was caused (a) by the Puget Sound Bridge & Dredging Company, having the contract for dredging and filling in connection with the terminal structure; (b) by delaying notice to the dredging company to commence work; (c) by the act of an inspector in rejecting materials. The second contention is one of law, that, on March 10, 1914, the date of the agreement fixing liquidated damages, the Port of Seattle had waived all claims for damages growing out of delay. Section 27 of the specifications for the work provides that:

“The Port of Seattle shall not be answerable to one contractor for any damage or loss he may suffer through the fault of any other contractor or subcontractor of another contractor.”

If this clause is to be given effect, it is evident that Pederson cannot, as against the Port of Seattle, claim liability for any loss sustained by him from the dredging company. As a matter of law, this is not disputed, but the claim is advanced that this provision was not in the specifications sent to Pederson upon which he based his bid, and that he had no knowledge of its existence until it was called to his attention later on by the commissioners. Whatever may be the fact as to whether or not this provision was in the specifications upon which Pederson based his bid, it was unquestionably a part of the contract when he signed it, and, as such, he was bound by it. Irrespective of this, we fail to find any warrant in the evidence for finding that the dredging company delayed Pederson. Under his contract, Pederson was to construct sheet piling bulkheads from the inner end of the pier outward to a point twenty feet below city datum. The dredging company was then to fill in between the bulkheads to a required elevation, upon which the superstructure was to be erected. Pederson was dilatory in complying with this provision of his contract and had not completed it when the dredging company was ordered upon the work. The delay in notifying the dredging company to commence its work in no manner injured Pederson, as his part of the work was not ready when the port commissioners notified the dredging company to proceed with its contract.

As to the claim of delay by reason of the unwarranted rejection of materials by an inspector, the only answer necessary is found in the agreement of March 10th, wherein it was expressly decided that the port commission was not responsible for the delay. The only dispute between the parties is as to whether or not Pederson's delay is excusable.

The last contention is that of waiver in law. There is neither fact nor law upon which this claim can be sustained. Appellant relies upon *Erickson v. Green*, 47 Wash. 613, 92 Pac. 449, and *Wright v. Tacoma*, 87 Wash. 334, 151 Pac. 837. In each of those cases the payments held to constitute

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waiver were made after the completion of the contract. In this case the port commissioners refused to make estimates and payments to Pederson subsequent to December 29, 1913, until after the agreement of March 10, 1914, when, as recited in the agreement, the estimate made to February 28th, amounting to \$21,663.13, was paid. Under these facts there can be no waiver. Up to December 29th, Pederson was within the time fixed in the contract, though backward in his work. Any waiver, therefore, must have been by reason of payments subsequent to that date. There was none until by agreement of March 10th the parties fixed the liquidated damages in order that Pederson might go ahead and complete his contract, which apparently he otherwise could not have done, as he was then behind one hundred and fifty-five days facing a demurrage of \$15,500, with \$100 to be added for each additional day to be consumed before the contract could be completed, and with the refusal of the port to pay any further estimates. Under these circumstances and to relieve himself from this situation, he entered into the agreement of March 10th, one manifestly to his advantage and without which it is probable the contract could not have been completed.

Appellant places great stress upon the testimony of Paul P. Whitham, who, during a part of the time, was chief engineer of the Port, but who resigned prior to the final settlement, and for this reason took no part in the question of demurrage to be charged. Whitham testified, in response to an inquiry as to whether or not he believed that \$3,000 should be charged against Pederson, that while, under its contract, the Port could demand the \$3,000, in view of all the circumstances, and "on rather a broad basis of general human fairness," he would have been disposed, had the matter rested upon him, to have recommended the return of the \$3,000. Whitham's conclusion as to his probable action in the matter is clearly not material. He was not in any official position that would make his opinion binding upon the Port, nor was it bound by his act. Whitham's testimony, on

the whole, is rather to the effect that Pederson was responsible for the delay. In response to a question by the court as to whether or not Pederson was at fault for the delay and that it was not caused by his act or want of diligence, Whitham answered:

"No, I do not say that. Mr. Pederson, of course, was the primary contractor, and his agents mismanaged the thing during the early part of the summer of 1913 and on into the fall; and later, after Mr. Pederson took charge of it, of course he reorganized it and carried it on in better shape, and the opinion I expressed was only on the grounds that certain difficulties that he had been up against, and the thing had suffered, perhaps, on account of the acts of agents and otherwise, that I had in mind that outside of the rights of the contract, on the basis of a fair and human equity, that I would make a suggestion or recommendation to the port commission, that he be relieved of that three thousand dollars."

The truth of the matter is that a subcontractor of Pederson, who undertook to put in the sheet piling for the bulkhead during October and November, 1913, was incompetent to handle the work. The incompetency and incident delay of this contractor's methods became so pronounced that Pederson terminated his contract and called upon his bondsman to make good his default. Other delays were occasioned by the dilatory methods of those whom Pederson placed in charge of the work during his absence in Europe from June to October, 1913. These causes, as to which Pederson cannot excuse his liability, would represent more than the thirty days he was charged with, and justified the finding of the chief engineer who succeeded Whitham that Pederson was responsible and should be charged with the \$3,000.

We can reach no other conclusion from the record than that the lower court was correct in its findings, and the judgment is affirmed.

ELLIS, C. J., CHADWICK, MAIN, and WEBSTER, JJ., concur.

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Opinion Per PARKER, J.

[No. 14037. Department Two. June 30, 1917.]

N. RICKER, *Respondent*, v. OREGON-WASHINGTON RAILROAD  
& NAVIGATION COMPANY *et al.*, *Appellants*.<sup>1</sup>

**APPEAL—PRESERVATION OF GROUNDS—SPECIFIC MOTIONS.** Where, in an action for injuries at a railroad crossing, the evidence presented an issue as to defendant's negligence on the theory of last clear chance, error cannot be predicated upon the denial of a general motion for judgment challenging the sufficiency of the evidence, although other questions of negligence and the plaintiff's contributory negligence should have been taken from the jury, had the court been requested to do so.

**RAILROADS — CROSSING ACCIDENTS — NEGLIGENCE — LAST CLEAR CHANCE—EVIDENCE—SUFFICIENCY.** The doctrine of last clear chance applies where the engineer upon a train approaching a crossing, saw, at a distance of 700 or 800 feet, or in the exercise of reasonable care should have seen, the plaintiff's traction engine on the crossing, stalled near the railroad tracks in a position of peril, but did nothing to attempt to stop the train until within 100 feet of the crossing, when it was too late to avoid a collision, and it appears that the train should have been stopped and was stopped within a distance of 500 or 600 feet.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered October 24, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

*Bogle, Graves, Merritt & Bogle*, for appellants.

*Forney & Ponder*, for respondent.

**PARKER, J.**—The plaintiff, Ricker, seeks recovery of damages which he alleges resulted to him from the negligence of defendant railway company and Dunlap, one of its locomotive engineers, in causing one of its trains to collide with and injure a large traction engine belonging to the plaintiff, at a crossing near the northern limits of the city of Chehalis. Trial in the superior court for Lewis county resulted in ver-

<sup>1</sup>Reported 166 Pac. 71.

dict and judgment against the defendants, from which they have appealed to this court.

The railway's double track main line runs approximately north and south through Chehalis. Its north-bound trains run over the east track, while its south-bound trains run over the west track. The street crossing in question is near and within the northern limits of the city, about a mile north of the company's depot. A spur track also runs across this street about forty-four feet east of the east main line track. A person upon the crossing at the spur track has a clear and unobstructed view of both main line tracks to the south for a distance of eight hundred feet or more. As one approaches the main line tracks from the spur track, his vision is very materially lengthened to the south. This is because, at a distance of about eight hundred feet south from the crossing, the tracks curve slightly to the east and the embankment along the east side of the right of way ceases to obstruct the view to the south as one approaches the main line tracks. Respondent owns a large gasoline traction engine capable of attaining a speed of only about four miles per hour. It is operated much as an automobile, and apparently is as easily managed. In any event, in view of its slow speed, it is capable of being stopped in a very short distance when in motion. The evidence indicates that it could be stopped within four or five feet, even when proceeding at its greatest speed.

About noon of the day in question, respondent approached this crossing from the east, driving his traction engine. Coming to the foot of the hill and the spur track, he observed a train approaching from the north on the west main track. He then stopped his engine with the rear wheels just west of the spur track. This brought the front of his engine within thirty feet of the east main line track, and brought plaintiff himself within forty feet of the east main line track. He says he could then see along the main line tracks to the south for a distance of "better than nine hundred feet." While waiting there for the south-bound train to pass, he looked to the south



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for the approach of any train from the south over the east track, being the one nearest to him. He continued to so look to the south for the approach of any train from that direction until the south-bound train had about cleared the crossing, and, as he claims, then not seeing any train approaching from the south, he turned his attention to his engine and immediately started it with the view of crossing the main line tracks. He proceeded at a speed of about three and one-half miles per hour until the front of his engine was very near the east main track, not having looked to the south while so proceeding. His attention was then attracted by the sharp whistle of an engine, and, looking up, he saw an engine and passenger train approaching from the south over the east main track. He instantly decided that he could not pass over the east main track with his traction engine before the approaching train would reach him, so he stopped his engine with the front wheels resting upon or very near the east rail of the east track and attempted to back it, but was unable to do so before the train struck the forward part of his engine, causing the damages for which he here sues to recover. He was not injured himself. The engine of the train ran five hundred and eleven feet after striking his engine.

There was testimony introduced sufficient, we think, to warrant the jury in believing that the engineer saw, or would have seen, had he been exercising proper care, respondent approaching near the east main track with his heavy, slow moving traction engine, and appreciated, or should have appreciated, the fact that respondent was in a position of peril which he did not appreciate and from which he would not be able to extricate himself, when the engine of the train was seven or eight hundred feet from the crossing; that the steam was not shut off from the approaching engine or the brakes of the train applied until it was within one hundred feet or less of the crossing; and that the train could have been stopped before reaching the crossing after the engineer

saw, or in the exercise of proper care should have seen, respondent's position of danger near and upon the main line crossing. The evidence indicates that the train was running at a speed of between twenty-five and thirty miles an hour; that its speed had not materially diminished when it passed over the crossing, and that, up until within one hundred feet of the crossing, its speed was being accelerated, so that its speed was probably somewhat less at a point seven or eight hundred feet before reaching the crossing. We are not here stating our conclusions as to what the facts are in these particulars, but only that the evidence was such that the jurors, as reasonable persons, might so view the situation. This is as far as we are permitted to go in considering the facts.

It is contended by counsel for appellants that the trial court erred in declining to take the case from the jury and decide, as a matter of law, that respondent could not recover, timely motions being made in that behalf. This contention is rested upon the theory that the evidence was not sufficient to support any finding of negligence on the part of appellants, aside from their liability under the rule of last clear chance; that the evidence conclusively showed that respondent was guilty of contributory negligence, and that the evidence was not sufficient to warrant submission of the cause to the jury under the last clear chance rule. The questions thus raised were presented to the trial court by motions for judgment in appellants' favor; and also by exceptions to those portions of the court's instructions which submitted to the jury the question of appellants' negligence under the rule of last clear chance, in addition to the question of appellants' negligence apart from that rule, and in addition to the question of respondent's contributory negligence. There were no requests made in appellants' behalf for instructions to the jury excluding from its consideration any of these questions, except as the motions for judgment in appellants' favor may be so construed; but those motions amounted only to a general objection to the case going to the jury upon any theory.

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In other words, counsel for appellants did not ask the trial court to separately rule upon the question of appellants' negligence apart from the last clear chance rule, respondent's contributory negligence, or appellants' negligence under the last clear chance rule, except that their exceptions to the instructions given touching the last clear chance rule may be construed as a request for a separate ruling on that question. Thus we find appellants in a situation which may be likened to that of one who demurs generally to a complaint setting up two or more causes of action, when there will necessarily result a ruling against him if any of the causes of action are good and properly pleaded. This, we will assume as we proceed, is not true of counsel's exception to the instruction submitting to the jury the question of appellants' liability under the last clear chance rule, but it is manifestly true of the other two questions.

The facts of the case, which we have above summarized, seem to compel the conclusion that the evidence was not sufficient to carry the case to the jury upon the question of appellants' negligence apart from the last clear chance rule, and also that respondent was guilty of contributory negligence, and that if these were all the questions to be decided in the case, it should be held, as a matter of law, that respondent could not recover. We shall, however, assume, rather than decide, that appellants would have been entitled to have both these questions taken away from the jury, had separate rulings been asked for instead of, or in addition to, the motions for judgment in their favor. The court might have committed error in refusing to take these questions from the jury, had requests therefor been made other than by their motions for judgment, and still not have committed error in refusing to take the entire case from the jury, since the question of appellants' negligence under the last clear chance rule was still to be decided. Of course, the court should not have taken that question from the jury, if the evidence called for its submission, simply because the other two questions should

have been taken from the jury. From these considerations we think it follows that appellants are not now entitled to a reversal of the judgment and a judgment in their favor, as a matter of law, simply because the trial court allowed the questions of appellants' negligence apart from the last clear chance rule and the question of respondent's contributory negligence to go to the jury, if we shall conclude that the question of appellants' negligence under the last clear chance rule was properly submitted to the jury. Each of these three questions was submitted to the jury by the court's instructions, in a sense in the alternative.

We come now to the real problem in the case, which is, Was the evidence such as to call for the submission to the jury of the question of appellants' negligence under the last clear chance rule? That we may have clearly before us that rule and the conditions under which it is rendered applicable as a test of a defendant's negligence, the plaintiff being guilty of contributory negligence, we quote from two of our decisions touching that subject. In *Nicol v. Oregon-Washington R. & Nav. Co.*, 71 Wash. 409, 128 Pac. 628, 48 L. R. A. (N. S.) 174, Judge Gose, speaking for the court, said:

"The doctrine of last clear chance is applied perhaps most frequently to cases where the plaintiff's negligence has terminated, and where the defendant thereafter, in the exercise of reasonable care and owing a duty to exercise it, should have discovered the peril in time to have prevented an injury. It has also often been applied where it would be apparent to one in control of a dangerous agency, if exercising reasonable vigilance, that a traveler is unconscious of his danger or so situated as to be incapable of self-protection; and in such cases, if the one controlling the agency could have averted the danger by exercising reasonable care and failed to do so, liability follows. It is based upon the principle that the negligence of the one is remote, and that the negligence of the other is the proximate and efficient cause of the catastrophe, he having the last clear opportunity of preventing it."

In *Mosso v. Stanton Co.*, 75 Wash. 220, 134 Pac. 941, L. R. A. 1916A 943, Judge Ellis, speaking for the court, said:

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Opinion Per PARKER, J.

"The appellant cites certain authorities, most of them railroad or street car cases, and some of them cases arising on injuries to trespassers on railroad tracks, to sustain the contention that in no case can a plaintiff recover where his negligence continues up to the time of the injury. The authorities cited hardly bear that construction. . . . At any rate, this court has held, in accordance with many courts and with what we conceive to be the more logical as well as the more humane rule, that where the peril of a traveler on the highway is actually discovered and should be appreciated by the operator of a street car, or other agency of danger, there arises a new duty to exercise all reasonable care to avoid injury, and the failure to exercise such care, if it results in injury, will render a defendant liable notwithstanding the continuance of the plaintiff's negligence up to the instant of the injury."

These views of the rule and its application are adhered to in *McKinney v. Port Townsend & P. S. R. Co.*, 91 Wash. 387, 158 Pac. 107.

We have seen that the evidence was such as to warrant the jury in believing that the engineer saw, or in the exercise of reasonable care should have seen, respondent upon his traction engine under such circumstances that he must have appreciated the peril in which respondent's position placed him when the train was seven or eight hundred feet away; that the train could have been stopped, and was actually stopped, within a distance of five or six hundred feet, and that the engineer was negligent in not attempting to stop the train within such distance; that he could have brought it to a stop before reaching the crossing. We concede that this becomes a very close question of fact under the evidence in this case, and one which, were we sitting upon as triers of the fact rather than as triers of the law, we might arrive at a different conclusion upon than that which the jury did; but we cannot say, under all the facts and circumstances of this case, that there is not room for honest difference of opinion among reasonable minds as to the negligence of the engineer in not stopping the train before it reached the crossing.

Some contention is made touching the correctness of the instructions given by the court other than those relating to the last clear chance rule. We are quite clear that they were not prejudicially erroneous. We think the law was fairly stated therein, though, as we have seen, probably the questions of appellants' negligence apart from the last clear chance rule and the question of respondent's contributory negligence should have been taken from the jury, had the court been requested so to do. The only complaint of the instruction touching the last clear chance rule is that that question should not have been submitted to the jury.

The judgment is affirmed.

ELLIS, C. J., MOUNT, and HOLCOMB, JJ., concur.

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[No. 14121. Department Two. June 30, 1917.]

THE STATE OF WASHINGTON, *on the Relation of National Bank of Tacoma, Appellant*, v. THE CITY OF TACOMA *et al., Respondents*.<sup>1</sup>

MUNICIPAL CORPORATIONS — LOCAL IMPROVEMENTS — BONDS — PAYMENT—STATUTES. Where local improvement bonds were issued under ordinances and the law of 1899, p. 238, § 9, providing that each bond should be payable only out of the local improvement fund and that there should be no claim thereon against the city, except by enforcement of the special assessment, the city council had no power to provide for their payment, in case of a deficit, by the creation of a local improvement district surplus fund, made up from the surplus moneys in the funds of improvement districts, the bonds to be assigned to the city, nor in any other way than as limited by law to the special assessments against the property.

SAME. A local improvement district surplus fund, for the payment of deficits in local improvement funds, which is "subject to disposition by the city as it shall see fit" is absolutely within the city's discretion, which, in the absence of fraud or arbitrary mismanagement, cannot be controlled by mandate in the interest of bondholders seeking to have the same applied to the payment of their bonds.

<sup>1</sup>Reported in 166 Pac. 66.

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Opinion Per HOLCOMB, J.

**SAME—REPRESENTATION—STATEMENTS BY OFFICERS.** A city treasurer and councilman has no power to bind the city by a statement or representation to a purchaser of local improvement bonds, buying the same from a contractor, which would set aside the provisions of the law or ordinances or enlarge the liability of the city.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered December 11, 1916, upon sustaining a demurrer to the application, dismissing an action for a writ of mandamus. Affirmed.

*Hayden, Langhorne & Metzger*, for appellant.

*U. E. Harmon and Frank M. Carnahan*, for respondents.

HOLCOMB, J.—Upon sustaining a demurrer to the application of the relator for a writ of mandate directed to the city of Tacoma and certain of its officers, the court dismissed the action, and the relator appeals.

The facts, as set forth in the application for the writ, together with an amending stipulation, are in substance as follows: On October 6, 1909, the city of Tacoma initiated local improvement district No. 693, having for its object the improvement by planking and guttering the road in an outlying section of the city. The improvement district was regularly created and the improvement duly completed and accepted. In part payment of the contract price, the city caused to be issued and delivered to the contractor sixty-four bonds of the local improvement district, aggregating \$6,312.30. These bonds were issued pursuant to city ordinances Nos. 1,388, 3,923, and 4,154. These bonds, by their terms, matured August 9, 1915, at which time there remained outstanding and unpaid bonds Nos. 27 to 64 inclusive, which are now, and were at the time of the institution of this action, in the possession of the relator. There is not now, and has not been since the maturity of these bonds, any moneys in the fund of local improvement district No. 693 to be applied to the payment of the bonds, or any of them. Previous to the initiation of this improvement, the city council of Tacoma

had enacted ordinance No. 3,377, which remains unamended and unrepealed by any express ordinance referring and relating thereto. This ordinance is entitled, "An ordinance creating a fund to be known as Local Improvement District Surplus Fund," and authorizing the disposition of such moneys, and after defining what shall constitute the fund, and providing for its immediate endowment by the transfer to it of the surplus moneys remaining in the funds of the several improvement districts which at that time had been paid out in full, contains the following:

"Section 3. That no moneys shall be taken or used from said local improvement district surplus fund except under the following conditions: (a) When the date has expired for the final call of bonds in any local improvement district of the city of Tacoma, and there remains outstanding any bond or bonds against said local improvement district on account of an insufficient amount of money in the local improvement district fund, then the city treasurer shall transfer from the local improvement district surplus fund to such local improvement district fund such an amount as shall be needed to call and retire such bond or bonds. Said bond or bonds, however; upon the redemption as above provided, shall be assigned to the city of Tacoma and retained by it and become its property, and shall not be cancelled or cease to be a lien upon property in the local improvement district, subject to assessment until all the assessments made in such district have been paid either directly or through foreclosure proceedings on behalf of said city."

When the bonds issued in local improvement district No. 693 were delivered to the contractor, he went to the relator, accompanied by Ray Freeland, then one of the city councilmen and city treasurer. To induce the bank to buy the bonds, Freeland represented to it that the local improvement district surplus fund, created by ordinance No. 3,377, provided a guaranty for the payment of the bonds in the event that the special assessments levied to retire the bonds should fail to provide enough funds for that purpose, and that the fund



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was created for the express purpose of making certain the ultimate payment of local improvement district bonds, and particularly of those issued in outlying improvement districts, and that the fund had been used, and was then being and would be used, to pay bonds of improvement districts which remained outstanding after the date fixed for their final call, in cases where there were insufficient funds in the local improvement district fund out of which such bonds should have been paid in the first instance. Relying upon these representations and upon the existence of the local improvement district surplus fund, the bank purchased the bonds. They reached maturity, and the last thirty-eight remained unpaid. At that time there were outstanding previously matured bonds of but two other local improvement districts, to wit: Nos. 704 and 542, in which districts the total outstanding bonds amounted to \$5,200. In the meantime, by ordinance No. 5,192, passed January 15, 1913, the city had transferred \$10,000 from the local improvement district surplus fund to the general fund. That ordinance is also set out in full. At this time, and, in fact, during all of the times referred to, there was and still remains in force ordinance No. 3,201, set out in full, which in brief provides that, whenever any money is, by ordinance, transferred from one fund of the city to any other fund of the city, such sums so transferred shall be, by the proper officers, transferred back to the original fund whenever there is a sufficient amount in the fund transferred to pay back the amount so transferred. When these bonds reached maturity and were unpaid, the relator demanded of the city that it take over the bonds, using the moneys of local improvement district surplus fund, and if there were insufficient moneys in that fund, then that it retransfer from the general fund all or a sufficient part of the \$10,000 transferred by ordinance No. 5,192 to the general fund to pay the bonds and accrued interest. The demand was refused and this action resulted.

The contention of the appellant is that ordinance No. 3,377, creating a fund to be known as Local Improvement District Surplus Fund, created a rotating fund out of which the bonds of the several local improvement districts within the city might be cared for without incurring any general liability upon the part of the city, and without subjecting the individual bondholders to the expense and trouble of maintaining an action of foreclosure upon the particular property within the district which had suffered default in the payment of the assessment levied against it; that it provided in effect that, so long as there should remain after the discharge of all obligations, bonds or otherwise, surplus moneys arising from the excess penalty and interest of other local improvement districts, the city would use them for the purchase of defaulted bonds of other districts, and would itself undertake the collection of such bonds in the manner prescribed by law and relieve the individual bondholders of this burden; that at the most it contemplated a temporary transfer from the local improvement district surplus fund to the special improvement district fund with what the council considered an assured income.

It is also asserted that this levy was intended primarily for the benefit of owners of land within a prospective local improvement district, because, by the assurance which it got that the bonds of that district would be paid promptly at or before maturity, the discount commonly figured in all contractors' bids could be for all practical purposes eliminated, thereby reducing the cost of the improvement; and secondarily, for the benefit of the city at large by establishing and maintaining the city's credit and good will and by reducing the cost of all similar improvements in the city. It is further urged that appellant expressly relied on the offer contained in this ordinance and paid the contractor for his bonds; and when their maturity was reached and the city had failed to collect the several assessments provided therefor, leaving thirty-eight bonds unpaid, that it had a right to ten-

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der said bonds to the city with the expectation that the city would avail itself of the remedies provided by it and pay the moneys due thereon to the appellant.

Appellant desires it to be especially noted, first, that it does not sue on the bonds which it holds, or seek to establish any liability therefor on the part of the city on the ground that they evidence an indebtedness of the city; and second, that this case does not call for a balance of the equities between the general city taxpayer on the one hand and the relator on the other, as was called for in *German-American Sav. Bank v. Spokane*, 17 Wash. 315, 49 Pac. 542, 38 L. R. A. 259, and that this case is to be distinguished from that; that the relator here seeks only those moneys to which the city and the general taxpayer have no moral right and which, if awarded to the relator, will not be raised by general or special taxation.

The ordinance (No. 3,923) creating local improvement district No. 693, contained the following provision:

“Out of said fund shall be paid the bonds, interest thereon and the entire cost of said improvement, and no part of such fund shall become the property of the city of Tacoma but shall be treated as a special trust fund for the purpose herein indicated.”

Another provision therein was as follows:

“In calling for bids the commissioner of public works shall state that the contractor doing the work shall agree to accept at par the bonds issued in pursuance of this ordinance in payment of the same, and shall have no claim whatever on account thereof against the city of Tacoma except solely upon said bonds, the special assessment made and the fund hereby created.”

This ordinance and another general ordinance, enacted by the city of Tacoma and referred to as ordinance No. 1,388, relating to the method of providing for special improvement district assessments, were enacted in strict conformity to the laws of the state relating thereto, particularly the acts of

1899, Laws 1899, pages 334 and 234, which laws provided that each bond issued under the provisions of such acts should provide that the principal sum therein named and the interest thereon should be payable out of the local improvement fund created for the payment of the cost and expense of such improvement, and not otherwise. And another section provided that neither the holder nor owner of any bond issued under the authority of the act should have any claim therefor against the city by which the same was issued except from the special assessment made for the improvement for which such bond was issued, but his remedy in case of nonpayment should be confined to the enforcement of such assessments; and a copy of this section should be plainly written, printed, or engraved on each bond so issued. Laws 1899, p. 238, § 9. The legislature passed a further act in 1901, Laws 1901, p. 240, § 10, relating to special assessments and the collection thereof and containing similar inhibitions. The bonds here in question contained a copy of § 9 of the act of 1899, which was copied and followed in the ordinance, No. 1,388, providing for special assessments in local improvement districts. The provisions thereof were, therefore, both impliedly and expressly written into and were part and parcel of the contract evidenced by the bonds.

As a first and fundamental proposition, it must be again asserted that, in this state, municipalities have no power except such as is expressly delegated by the state. When that power is enlarged or when it is diminished, the power of the municipality exists and dates therefrom. *State ex rel. McMannis v. Superior Court*, 92 Wash. 360, 159 Pac. 383. The special fund bonds for the improvement under the special improvement assessment were not obligations against the city. *Soule v. Ocosta*, 49 Wash. 518, 95 Pac. 1083. 2 Page and Jones, *Taxation by Assessment*, §§ 1505, 1506. The city had no power to provide for the payment of the obligations of the improvement district or the bonds to pay the obligations thereof except in the manner provided by law, and the law

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limited the payment to the assessments against the property. These improvement districts are special creatures of the law and each of them must stand by itself. The only way in which a deficiency can be provided for in any one district is by another assessment in each case. The debit in one fund cannot be offset by a credit in another fund. *Thayer v. Grand Rapids*, 82 Mich. 298, 46 N. W. 228. The relator stands in the shoes of the contractor for whose benefit the bonds were issued, and has only the same rights he would have had. Hamilton, Special Assessments, § 720.

The relator has no right or interest, so far as shown, in following any of the funds proposed to be turned into the fund created and to be known as local improvement district surplus fund, and has no right to compel their disposition in any manner. The situation here is in no wise similar to that governed by *Chehalis v. Robinson*, 87 Wash. 690, 152 Pac. 696, cited by appellant. That was a case of the property owners and payers of the sums into a special assessment fund, who had paid in excess of the amount that could lawfully be collected, following the funds they had paid in and collecting the excess back.

And if it be conceded, as argued by appellant, that the surplus remaining in any local improvement district fund after payment of the obligations outstanding against the same is money "subject to disposition by the city as it shall see fit," it does not avail appellant. If the funds are subject to disposition as it shall see fit, the city's discretion therein is absolute, in the absence of fraud or arbitrary mismanagement, and the relator cannot, by mandate, compel the disposition thereof by the city. The relator does not contend that there is any surplus fund remaining in local improvement district No. 693. On the contrary, it contends that there was a deficit. If there are any surplus funds arising from other local improvement districts they may belong to the persons interested in those districts, and, in fact, a subsequent state law (Laws 1909, p. 387), providing for the repayment of such bonds to

the payers-in thereof would seem possibly to have impliedly repealed the ordinance of 1908 establishing the local improvement district surplus fund of Tacoma, or to amend that ordinance by implication, so that the only power of application of the funds deposited therein shall be to repay the payers-in of funds of local improvement districts where a surplus arose.

Neither has appellant any right to rely upon any assurances or representations made by Freeland, the city treasurer and councilman, to it at the time the bonds were assigned to it. Freeland was but one city councilman, and was also city treasurer, and had powers and duties to perform in each capacity. He could not transcend his duties as city treasurer and make guaranties on behalf of the city which were beyond his powers and duties. He could not set aside the provisions of the law of the state or of the ordinances based thereon. Nor did any one have a right to rely upon representations which did in effect so do. As the city councilman he also had certain powers and duties, but as such he could not bind the city beyond its corporate powers nor add to the terms of any contract it had made, in any such informal and single-handed manner as is here relied upon. *Dickerson v. Spokane*, 35 Wash. 414, 77 Pac. 730. Neither Freeland, as one councilman, nor the city council itself had authority to pass an ordinance contrary to the provisions of § 9 of the act of 1899, which provided that the remedy of the bondholder in case of nonpayment should be confined to the enforcement of the assessments.

For these reasons, the judgment is affirmed.

ELLIS, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

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Opinion Per MORRIS, J.

[No. 13824. Department One. July 5, 1917.]

WILBUR H. APPLETON, *Appellant*, v. ADELAIDE APPLETON,  
*Respondent*.<sup>1</sup>

DIVORCE—DECREE—RES JUDICATA—SUBSEQUENT ACTION. A decree of separate maintenance denying a husband a divorce is *res adjudicata* as to all matters occurring between the parties up to that time, and also conclusive that the husband was in default, entitling the wife to live separate and apart; but it is not *res adjudicata* as to subsequent misconduct.

SAME—ABANDONMENT. The refusal by a wife, living separate and apart from a husband under a decree of separate maintenance, of the husband's good faith offer to resume the marriage relation, constitutes abandonment if continued for the statutory period of one year.

SAME—ABANDONMENT—COMPLAINT. A complaint alleging that the husband, subsequent to a decree of separate maintenance, requested in good faith that the wife return to him, and that she refused, preferring to live separate and apart, is sufficient to raise the question of his good faith as a question of fact, under the rule of law encouraging reconciliations and the resumption of the marriage relation.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered July 14, 1916, dismissing an action for divorce, after a trial on the merits before the court. Reversed.

*Robertson & Miller* and *Rosenhaupt & Grant*, for appellant.

*Merritt, Lantry & Merritt*, for respondent.

MORRIS, J.—Appeal from a judgment dismissing the complaint in an action for divorce. The complaint, after stating the jurisdictional facts, alleged that the parties hereto had not lived together for a period of three years; that, in the month of June, 1914, an action for divorce was started by the wife, the husband filing an answer and cross-complaint;

<sup>1</sup>Reported in 166 Pac. 61.

that the wife thereupon withdrew her complaint for a divorce and asked for separate maintenance; that, upon the hearing, the wife's prayer for separate maintenance was granted, and a divorce denied the husband upon his cross-complaint. It was further alleged that the parties had quarreled repeatedly before the commencement of the first action in 1914, and that owing to such repeated quarrels, rendering life burdensome to the plaintiff, the parties could no longer live together as husband and wife. At the hearing, the complaint was amended to the effect that, shortly after the entry of the separate maintenance decree in June, 1914, the plaintiff, in good faith, called upon the defendant and requested her to return to him; that she refused to do so. Upon the hearing, motion was made for dismissal of the action on the ground that the complaint was insufficient to support a decree of divorce. This motion was granted by the lower court, seemingly upon the theory that the separate maintenance decree of June, 1914, was *res judicata*. That decree was undoubtedly *res judicata* as to all matters occurring between the parties up to that time. It was also conclusive of the fact that appellant was in fault, and, because of such fault, respondent was entitled to live separate and apart from him. *Loeper v. Loeper*, 81 Wash. 454, 142 Pac. 1138.

In so far as the complaint sought to review the issues of the former suit, it was undoubtedly bad and subject to attack. It was good, however, as to allegations of misconduct occurring subsequent to the entry of the first decree. That decree could not bar subsequent misconduct on the part of either party, and any such conduct falling within the statutory grounds for divorce would entitle the party not at fault to commence divorce proceedings. This complaint alleged that, subsequent to the entry of the separate maintenance decree, the appellant, in good faith, requested the respondent to return to him; that she refused, desiring to live apart from him under the order of separate maintenance. In determining the sufficiency of the complaint it must be accepted that



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the husband was honest in his intention to remedy his fault, and that the offer of reconciliation and request to return was made in good faith with an honest intention to abide thereby, and that the wife deliberately refused. The question then is, when a wife, living separate and apart from her husband because of his fault, deliberately refuses to return to him when, repenting of his error, he seeks reconciliation and requests her return, does such refusal constitute abandonment if continued in for the statutory period of one year. We think it does. *Hooper v. Hooper*, 34 N. J. Eq. 93; *McMullin v. McMullin*, 123 Cal. 653, 56 Pac. 554; *Jerolaman v. Jerolaman*, 54 Atl. (N. J. L.) 166; *Schraeder v. Schraeder*, 26 Ill. App. 524; *Johnson v. Johnson*, 125 Ill. 510, 16 N. E. 891; *Briggs v. Briggs*, 24 S. C. 377; *Walker v. Loughton*, 31 N. H. 111.

The good faith of the appellant's offer is a question of fact which can only be determined upon hearing. *Musgrave v. Musgrave*, 185 Pa. St. 260, 39 Atl. 961. The law is inclined to encourage reconciliations and the resumption of the marital relation between estranged spouses. In enforcing this rule it has been held that not only will the refusal of a good faith offer to resume the broken relation put the refusing party in actionable default, but that it will defeat the enforcement of orders and decrees of separate maintenance. 1 Bishop, Marriage, Divorce and Separation, § 1539; *Almond v. Almond*, 4 Rand. (Va.) 662, 15 Am. Dec. 781; *Kenley v. Kenley*, 2 How. (Miss.) 751. The allegations of this complaint were sufficient to bring appellant within the rule, and the cause should have been heard upon its merits upon this one issue.

Reversed and remanded for trial.

ELLIS, C. J., MOUNT, and CHADWICK, JJ., concur.

[No. 14138. Department One. July 5, 1917.]

MARY A. ANDERSON, *by her Guardian Frances A. Roberts,*  
*Respondent*, v. JOHN S. ANDERSON, *Appellant*.<sup>1</sup>

DIVORCE—DECREE—VACATION—ATTACK FOR FRAUD. An attack upon a judgment of divorce for fraud in its procuring, by petition in the original suit, is contrary to proper practice and is the inception of a separate independent action.

SAME—DECREE—ALIMONY—POWER TO MODIFY. Where the power to modify an absolute decree of divorce is not reserved, the court has no revisory control to be exercised at will.

SAME—DECREE—VACATION—FRAUD—POWER TO MODIFY. Where an absolute decree of divorce awarding alimony is attacked upon the ground of fraud in concealing property from the wife, and the court finds that there was no fraud in the original case, there is no jurisdiction to set aside or modify the decree.

Appeal from a judgment of the superior court for King county, Jurey, J., entered November 22, 1916, upon findings in favor of the plaintiff, in an action to vacate a decree of divorce on the ground of fraud, tried to the court. Reversed.

*Frank E. Hammond*, for appellant.

CHADWICK, J.—On the 16th day of July, 1915, Mary A. Anderson was divorced from her husband, John S. Anderson. A decree was entered granting to the plaintiff certain property and \$15 a month alimony for the care and support of a minor child. Sometime thereafter, Mrs. Anderson was adjudged to be an insane person, and the custody and guardianship of the child was transferred to the father, John S. Anderson, by the juvenile court. Frances A. Roberts was appointed guardian of Mary A. Anderson and has filed a petition in the original action, alleging that the defendant was guilty of fraud in procuring the decree of divorce, in that he concealed property of great value and which in equity should be shared with his former wife. The filing of a petition in

<sup>1</sup>Reported in 166 Pac. 60.

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the original suit is contrary to the practice as defined by our former decisions. An attack upon a judgment, for fraud in its procuring, by petition is the inception of a separate, independent action. *Roberts v. Shelton Southwestern R. Co.*, 21 Wash. 427, 58 Pac. 576; *Cooper v. Cooper*, 83 Wash. 85, 145 Pac. 66.

The court, however, entertained the petition to modify the decree and, over the objection of the appellant, heard the evidence offered by the petitioner. Notwithstanding an affirmative finding that appellant had been guilty of no fraud or concealment in the procuring of the decree of divorce was made, the court found that Mary A. Anderson was entitled to and should receive from the defendant \$15 a month, to be paid to her guardian, and that he should pay off and discharge the lien of a certain mortgage upon the property which had been theretofore decreed to his divorced wife.

A decree of divorce stands upon no higher ground than a decree in any other suit or proceeding. The court so held in *Ruge v. Ruge*, ante p. 51, 165 Pac. 1063, saying:

“We must disabuse our minds of the thought that there is any peculiar mystery attaching to decrees of divorce and alimony merely because they are such. But if they and their incidents are to be treated differently from ordinary judgments and decrees, it must be so because of some scientifically and logically sound basis upon which they can be considered as exceptions to the general rules.”

Divorce decrees are considered to be within an exception to the general rules governing the stability of judgments, in that the court may specifically withhold its jurisdiction to modify a decree to meet the changed conditions of the parties or property, or when the welfare of a minor child is involved. If the divorce decree is absolute and does not come within the above mentioned exceptions, “there is no power in the court to modify or alter it to meet the changed conditions.” *Ruge v. Ruge*, supra.

When a decree absolute is once entered, the rights of the parties are to be measured and determined as those of ordi-

nary litigants, stripped of that element of sentimentality which too often enters into and becomes a part of a decree of divorce. *Hector v. Hector*, 51 Wash. 434, 99 Pac. 13; *Dolby v. Dolby*, 93 Wash. 350, 160 Pac. 950. The court does not retain a revisory or supervisory control to be exercised at will or within the limit of juridical discretion because the parties have theretofore been husband and wife.

We understand the rule to be, and there is no exception to it as far as we are advised, that a court cannot, upon petition or motion and by subsequent order, amend or modify its decree unless the right so to do is reserved. A court has jurisdiction to vacate a decree and to enter another decree under certain conditions enumerated and within the time limit fixed by statute. A court of equity will also take jurisdiction to set aside a decree on the ground of fraud practiced upon the parties or upon the court, but before the court has jurisdiction to proceed to modify the old or to enter a new decree, it must set aside its former decision upon some ground recognized either in law or equity.

The ground upon which the respondent in this case predicates her right to vacate the decree is that fraud was practiced. The court found there was no fraud, and granting the right to proceed by petition in the original cause, it follows that it had no jurisdiction to either set aside the existing decree or to modify it upon a subsequent hearing. The law governing is sufficiently discussed in *Wagner v. Northern Life Ins. Co.*, 70 Wash. 210, 126 Pac. 434, 44 L. R. A. (N. S.) 338, and *Forsyth v. Dow*, 81 Wash. 137, 142 Pac. 490.

The judgment of the court below is reversed. Remanded with instructions to dismiss the petition.

MORRIS and WEBSTER, JJ., concur.

ELLIS, C. J., concurs in the result.

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Opinion Per MOUNT, J.

[No. 13864. Department Two. July 5, 1917.]

STIMSON TIMBER COMPANY, *Respondent*, v. MASON COUNTY,  
*Appellant*.<sup>1</sup>

**SCHOOLS AND SCHOOL DISTRICTS — BONDS — ELECTIONS — TIME OF OPENING POLLS.** A school district election for the issuance of bonds for the construction of a schoolhouse is void where, pursuant to notice, the polls were not opened until two o'clock, in view of Rem. Code, § 4658, which provides that, unless otherwise designated in the notice of election, the polls shall be open at one o'clock in the afternoon and close at eight o'clock, but that the board may, previous to giving notice, determine on an hour for closing not later than four o'clock; the requirement that the polls be open at one o'clock being mandatory.

**SAME—DISTRICT BOARDS—POWER TO BUILD SCHOOLHOUSE.** Under Rem. Code, §§ 4493, 4538, providing that the board of directors of school districts of the third class shall build schoolhouses when directed by a vote of the district to do so, and § 4664, authorizing the calling of a special meeting of the voters to determine the question, the school directors have no authority to build a schoolhouse, where their only authority was a special election upon the question of bonds which was void for want of legal notice of the election.

**TAXATION—RECOVERY OF VOID TAX—PARTIES — TRUSTEE — SCHOOL DISTRICTS.** A school district is not a necessary party defendant in an action to recover an illegal school district tax, where the collection was made by the county as trustee for the school district.

**SAME—VOID TAX—RECOVERY—PROTESTING LEVY.** Where a tax is void, it is not necessary to protest its levy, but the taxpayer may wait until the tax is collected under protest, and recover back the tax paid.

Appeal from a judgment of the superior court for Mason county, Mitchell, J., entered October 30, 1916, in favor of the plaintiff upon the pleadings, in an action to recover a tax paid. Affirmed.

*R. A. Lathrop* and *A. C. Bayley*, for appellant.

*Ballinger & Hutson*, for respondent.

MOUNT, J.—This action was brought to recover a tax, alleged to be void, paid under protest. The appellant filed a

<sup>1</sup>Reported in 166 Pac. 251.

demurrer to the complaint upon the grounds: First, that the court had no jurisdiction of the subject-matter; second, that the plaintiff had no legal capacity to sue; third, that there was a defect of parties defendant; fourth, that the complaint does not state a cause of action; fifth, the action was not commenced within the time limited by law. The demurrer was overruled and the defendant answered, admitting the material allegations of the complaint, and the court entered a judgment upon the pleadings. This appeal is from that judgment.

The complaint alleged in substance: That the plaintiff owned certain real estate in Mason county; that the taxes for the year 1915, assessed against the plaintiff's property, included a special four mill tax levied for School District No. 45, of Mason county, for the purpose of constructing a schoolhouse; that, when the taxes became due, the plaintiff offered to pay all the taxes except the four mill levy, which offer was refused, and thereupon the plaintiff paid the whole tax and protested against the payment of the four mill tax levied for the purpose above stated; that it was necessary to pay the taxes in order that the plaintiff might utilize its property.

The complaint alleged that the four mill tax levied for the school district was void because the board of directors of the school district were not authorized to build the schoolhouse for which the tax was levied; that, on the 17th day of June, 1915, the board of directors of the district passed a resolution as follows:

"Resolved: That the school board issue \$1,500 in bonds for the purpose of building a new schoolhouse upon the present site, these bonds to be \$100 each, payable in five years. The school board reserve the right, however, to pay or redeem said bonds or any part of them at any time after one year from date of bond."

And that, on the same day, the board of directors passed another resolution as follows:

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Opinion Per MOUNT, J.

“Resolved: That an election shall be called on the 30th day of June, 1915, for the purpose of voting \$1,500 bonds to build a new schoolhouse on the present site; said bonds to be for \$100 each, payable in five years. The school board reserve the right, however, to pay or redeem said bonds or any part of them at any time after one year of the date of bonds.”

The complaint then alleged that a notice of an election for the 30th day of June, 1915, was given, that the notice stated, “The polls will be open from 2 o’clock p. m. to 5 o’clock p. m.,” and that said polls were actually open at such hours only; that at said election at said time, twenty-nine persons voted for the issuance of the bonds, and fifteen persons voted against the issuance thereof; that thereafter, on August the 2d, 1915, the board of directors let a contract in the sum of \$1,212, for the building of a school house, which was afterwards constructed; that no bonds were ever issued by the district; that, on the 6th day of August, 1915, the board of directors reported to the county commissioners their annual estimate, including a four mill tax for the erection of said building, and thereafter the county commissioners levied for collection a special tax of four mills.

It is argued by the respondent that the bond issue was void for two reasons: First, because the polls at the bond election were not open until 2 o’clock, instead of at 1 o’clock as provided by statute; and second, because the directors of the district were not authorized to build a schoolhouse, and if the vote for the school bonds be deemed an implied authority for the building of the schoolhouse, it was conditional upon the issuance of the bonds, and the plans not having been pursued, the authority ceased. The court sustained these contentions of the respondent. The appellant contends here that the notice stating that the polls would be open from 2 o’clock p. m. until 4 o’clock p. m. was an irregularity merely, and that the result of the election was implied authority for the board of directors to construct the building. This presents the principal questions in the case.

The statute, Rem. Code, § 4658, provides, in regard to the notice, that:

“Unless otherwise designated in the notice of election, the polls shall be open at 1 o'clock in the afternoon and close at 8 o'clock in the afternoon, but the board of directors may, in districts of the second or third class, previous to giving notice of election, determine on an hour before 8 o'clock for closing, but they must not be closed earlier than 4 o'clock in the afternoon. In no case shall the polls be opened before the hour named in the notice, nor kept open after the hour fixed for closing the polls, but if there is not a sufficient number of electors present at the hour named for opening the polls to constitute a board of election, it shall be lawful to open the polls as soon thereafter as a sufficient number of electors is present.”

We think it is plain from this statute that the polls are required to be open at 1 o'clock in the afternoon, except where there is not a sufficient number of voters present at that hour to constitute a board of election. It is discretionary with the board to determine on an hour before 8 o'clock in the afternoon when the polls may be closed. It is apparent from this section of the statute that the polls must be open at 1 o'clock, and not closed earlier than 4 o'clock in the afternoon.

In the case of *Peth v. Martin*, 31 Wash. 1, 71 Pac. 549, we had under consideration a statute involving this same question, and held that the statute was mandatory, and that a notice of an election in violation of the terms of the statute rendered the election unauthorized.

As stated by the respondent, if the board of directors were authorized to fix a different hour than 1 o'clock in the afternoon for opening the polls, and also a time between 4 and 8 o'clock for closing the polls, they might fix the hour for opening the polls at 3:45 o'clock, and for closing the polls at 4 o'clock, so that the polls should be open but fifteen minutes. It was to avoid any such condition that the legislature fixed the hour for opening the polls at 1 o'clock, but authorized the directors to close at an earlier hour than 8 o'clock, but limited



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the closing hour to 4 o'clock. It was the duty of the board of directors to give notice that the election would be held between the hours of 1 and 4 o'clock. This was the shortest time which, under the statute, could be fixed for holding the election. It is plain, therefore, that the election notice was of no effect because it was in the face of the statute. The vote, therefore, upon the bonds was of no force and did not authorize the issuance of the bonds.

We are also satisfied that the board of directors were not authorized to construct the building. The board of directors of a school district of the third class are not authorized to build school buildings except by authority of the electors of their district. Rem. Code, §§ 4493, 4538. The latter section provides that the board shall build or remove schoolhouses *when directed by a vote of the district to do so*. Section 4664, Rem. Code, provides that:

“Any board of directors may, at its discretion and shall, upon a petition of a majority of the legal voters of their district, call a special meeting of the voters of the district, to determine . . . whether or not the district shall build one or more schoolhouses; . . . .”

It is conceded that the board of directors, prior to the passage of the resolutions hereinbefore set out, had not been authorized by the legal voters in the district to construct a schoolhouse. The resolution to build a schoolhouse was passed without any authorization of the board to that effect. The election upon the question of bonds did not authorize the directors to construct a schoolhouse, because the election for the bonds was not in accordance with the statute. Many electors who voted for the bonds may have been in favor of building the schoolhouse upon a bond issue, when they were not willing to construct the building without these bonds.

It is argued by the appellant that there is a defect of parties defendant, that the school district was a necessary party defendant. There is much force in the reasoning of the appellant upon this question, but this court has held that, where

the trustee is defendant, he alone may be sued without joining the *cestui que trustent* with him. *Thompson v. Price*, 37 Wash. 394, 79 Pac. 951; *Burdick v. Kimball*, 53 Wash. 198, 101 Pac. 845.

The county collected the tax for the school district, and it was not necessary to make the school district a party in order to recover the illegal tax.

It is next argued by the appellant that the action was not brought in time, because the respondent did not protest the levy of the tax at the time it was made by the county commissioners. If the tax was void, as we have held, it was not necessary for the respondent to protest its levy. It could wait until the tax was attempted to be collected and then pay under protest and recover back, as was held in the following cases: *Wyckoff v. King County*, 18 Wash. 256, 51 Pac. 379; *Tozer v. Skagit County*, 34 Wash. 147, 75 Pac. 638; *Owings v. Olympia*, 88 Wash. 289, 152 Pac. 1019.

We are of the opinion, therefore, that the trial court properly granted a judgment on the pleadings. The judgment is affirmed.

PARKER, FULLERTON, and HOLCOMB, JJ., concur.

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Syllabus.

[No. 13946. Department Two. July 9, 1917.]

**TITLE GUARANTY & SURETY COMPANY, *Appellant*, v.  
COFFMAN, DOBSON & COMPANY, *et al.*, *Respondents*.<sup>1</sup>**

**STATES — CONTRACTS — CONTRACTOR'S BONDS — NOTICE OF CLAIM — TIME FOR FILING.** Under Rem. & Bal. Code, § 1161, requiring claims against a contractor's statutory bond to be filed within 30 days from the "completion of the contract and acceptance of the work," a claim against a bond for the construction of a state bridge may be filed within thirty days after formal acceptance of the bridge by the highway commissioner, although the work was actually completed and the engineer made the final estimate some months previously, where the engineer derived no authority from the contract or the highway commissioner to accept the construction.

**SAME—CONTRACTS—CONTRACTOR'S BOND—NOTICE OF CLAIM—SUFFICIENCY.** The notice of a claim against a contractor's statutory bond securing claims for the construction of a state bridge substantially complies with the statute although it does not name the sureties, where the notice mentions the bond and states an intention to hold it liable, and there was no other bond given.

**SAME.** A notice of claim against a contractor's statutory bond securing claims for the construction of a state bridge is not void on account of including nonlienable items, where it contained several lienable items in excess of the claim which were not so commingled that they could not be distinguished from the nonlienable items.

**SAME—CONTRACTS—CONTRACTOR'S BOND—CLAIMS — RESERVE — ASSIGNMENT—RIGHTS OF CREDITORS AND SURETY.** Where a contract for the construction of a state bridge provided for the retention of the 20 per cent reserve for 30 days as a protection against claimants entitled to a lien, the reserve is a trust fund for labor and material claims against the contractor's bond, and not subject to assignment as against the rights of the surety on the contractor's bond; and this is true although the claim of the contractor's assignee was composed of lienable items, where the assignee failed to perfect its claim against the bond by filing the notice required by the statute.

**APPEAL—REVIEW—THEORY OF DECISION.** A decision based upon an erroneous theory will not be reversed if the conclusion is sound and the judgment is sustained by the evidence.

**STATES — CONTRACTS — CONTRACTOR'S BONDS — DEMANDS SECURED — ADVANCES LOANED.** Moneys loaned to a state contractor for the pur-

<sup>1</sup>Reported in 166 Pac. 620.

pose of, and actually used for, the payment of labor performed and materials furnished for the construction of a state bridge, for which the surety on the contractor's bond would have been liable, are debts and demands secured by the bond, for which notice of claim against the bond may be filed under Rem. & Bal. Code, § 1159.

**CONSTITUTIONAL LAW — OBLIGATION OF CONTRACT — CONTRACTOR'S BOND—RETROACTIVE STATUTE.** Rem. Code, § 1161-1, making retroactive §§ 1159 and 1159-1, providing that money loaned to a contractor upon public work should not be a valid claim against the contractor's statutory bond, as theretofore provided by Rem. & Bal. Code, § 1159, is unconstitutional as to a bond and contract executed prior to the enactment of the statute, since it impairs the obligation of the contract in violation of Const., art. 1, § 23.

**STATES—CONTRACTS — CONTRACTOR'S BONDS — RESERVE PAID INTO COURT—PARTIES ENTITLED—APPEAL—HARMLESS ERROR.** In a controversy between the surety on a contractor's statutory bond to the state and claimants for labor and materials, over the application of the twenty per cent reserve paid into court by the state, in which there are more than enough valid claims to use up all the money in court, so that there was a deficit to be made up by the surety, it is immaterial to the surety that part of the money was awarded to a claimant who was merely entitled to a judgment, where the reserve was applied on valid claims and any injury would be to other claimants entitled to the reserve, who are not complaining.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered June 26, 1916, upon findings in favor of the defendants, in an action by a surety to determine the validity of claims to a fund due a contractor on state work, tried to the court. Reversed as to respondent Frank Everett Company; affirmed as to other respondents.

*James B. Murphy*, for appellant.

*A. A. Hull* (*W. M. Urquhart, Jr.*, of counsel), for respondents Coffman, Dobson & Company and Frank Everett & Company.

*W. E. Bishop* and *W. A. Reynolds*, for respondent Morton Hardware Company.

*Peters & Powell*, for respondent United States Steel Products Company.

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Opinion Per HOLCOMB, J.

HOLCOMB, J.—On the 5th day of September, 1913, Hurley & Henry entered into a contract with the state highway board to construct a bridge across the Cowlitz river, in Lewis county, Washington. Appellant became surety for the contractors, giving the usual statutory bond on September 15, 1913. The contract was what is commonly known as a lump-sum contract, providing that the contractors should be paid at intervals of one month, based on estimates of the work done during such period, and that twenty per cent of the contract price should be retained by the highway board for a period of thirty days to ascertain if the contractors had paid all just claims which would entitle the claimants to a lien. The contractors completed the bridge but failed to pay, among others, the claims of respondents Coffman, Dobson & Company, United States Steel Products Company, Frank Everett & Company, and C. G. Smith, for labor and material. The highway commission retained \$5,578.75 of the amount due the contractors, pursuant to that provision of the contract above referred to. Appellant then brought this action, making as parties defendant the state highway commissioner and all the lien claimants, to fix and preserve the amount of money due from the state of Washington and to have it disbursed in payment of the claims for which it is liable. The amount due from the state of Washington was amicably agreed to be \$5,578.75, which amount was paid into court by the state; and upon a trial without a jury, a judgment was entered against appellant and in favor of the several respondents in various amounts.

On the trial below, the evidence tending to support the claims of the various respondents was introduced separately, and for this reason they will be separately discussed in this opinion.

I. The only point on which the validity of the claim of respondent United States Steel Products Company is assailed is that the claim was not filed with the highway board within thirty days from the completion of the contract and accept-

ance of the work, as provided in Rem. & Bal. Code, § 1161. It is not disputed that the claim was filed on November 11, 1914, but the controversy arises over the date that the work was completed and accepted. It is appellant's contention that the date of acceptance was September 29, 1914; while respondent United States Steel Products Company urges that the contract was completed and the work accepted on February 11, 1915, and the court so found. It is obvious, if the latter date is the correct one, the claim was filed in time to render appellant liable on the bond. The record shows that a final estimate of the work was made by an engineer of the highway department on September 29, 1914, at which time the work was actually completed, but no formal action was ever taken by the highway board to accept this work until February 11, 1915. It is appellant's argument that the bridge was completed and accepted within the meaning of the statute when the final estimate was completed by the engineer, and that the engineer had authority to, and by making the final estimate did, accept the bridge for the highway commissioner. In urging this theory, appellant relies largely on *Union Iron Works v. Strauser*, 82 Wash. 51, 143 Pac. 446; *Wheeler, Osgood Co. v. Fidelity & Deposit Co.*, 78 Wash. 328, 139 Pac. 53; *Denny-Renton Clay & Coal Co. v. National Surety Co.*, 93 Wash. 103, 160 Pac. 1.

While it is true that these cases held that the issuance of the final estimate or certificate by the architect or city engineer is conclusive on the question of acceptance, this ruling was based solely on the ground that, by the terms of the contract between the municipality and the contractor, the engineer or architect was clothed with authority to accept the structure for the municipality and did so by issuing the final estimate or certificate. We fail to find that the engineer who made the final estimate on this case derived any authority by virtue of the contract or from the highway commissioner to accept the construction, and since there was no affirmative acceptance of the bridge by such commissioner, as required by

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statute, until February 11, 1915, it is apparent that such date is the time when the thirty-day statute of limitations for filing claims against the bond starts to run. The claim of respondent United States Steel Products Company was, therefore, filed in time.

II. Many reasons are assigned by appellant to show that respondent C. G. Smith had no valid claim against the bond, the first of which is that the notice filed was insufficient in that it failed to name the surety. *Rodgers v. Fidelity & Dep. Co.*, 89 Wash. 316, 154 Pac. 444, is relied on to support this claim. In that case the notice was held insufficient because it did not state that there was a claim against the bond nor specify the sureties; but in the instant case, the bond was mentioned in the notice and that respondent C. G. Smith intended to hold it liable, and as there was only one bond for this work, the notice satisfied the intent of the statute and was a substantial compliance with it.

The validity of the notice is also assailed on the ground that the itemized portions thereof so commingled lienable and nonlienable items as to render the whole claim void. It was held in *Gilbert Hunt Co. v. Parry*, 59 Wash. 646, 110 Pac. 541, Ann. Cas. 1912B 225, that, when the notice contained lienable and nonlienable items and from the record it was impossible to ascertain which were lienable and which were not, the whole claim was void as against the bond. But the notice in question contains several items of cement and nails the price of which amounts to more than respondent's present claim, and which the evidence shows clearly were used in the construction of and became a part of the finished structure, and are, therefore, not so commingled with nonlienable items as to render them incapable of being distinguished.

It appears that the total claim of respondent C. G. Smith amounted to \$1,742.15, and that upon this debit the contractors made a payment of \$1,000 and received a credit of \$187 for sacks that were returned, leaving a balance still due respondent C. G. Smith. At the time the \$1,000 pay-

ment was made, credit was given for the payment, but no application thereof was made until the respondent had advised with an attorney to determine his rights. Then for the first time respondent applied the money paid to him in liquidation of all charges except the lienable items. It also fairly appears that this \$1,000 payment made by the contractors was part of the money they received as payment for their contract with the state, and appellant strenuously urges that respondent could not apply this money to the payment of items for which the bond was not liable, in order that the claim which could be asserted against the bond might be larger, as the surety is equitably entitled to have the moneys applied to the payment of the debt for which it is liable as surety. While this seems to be the general rule as announced in *Crane Co. v. Pacific Heat. & Power Co.*, 36 Wash. 95, 78 Pac. 460, where the application is made with knowledge of the source of the payment; where the payee is ignorant of the source of the money constituting the payment, as in the case at bar, a different rule has been adhered to by this court, viz.: That, when no instruction is given as to the application of the payment, it may be applied to a debt not secured by the bond. *Sturtevant Co. v. Fidelity & Deposit Co.*, 92 Wash. 52, 158 Pac. 740.

III. In considering the appeal involving the claim of respondent Frank Everett & Company, we find that no proper notice of claim was ever filed with the highway commissioner, nor is there any contention that the bond is liable for this claim, nor did the lower court so order, but did decree that the money paid into the registry of the court by the state, after the payment of the claim of respondent Coffman, Dobson & Company, be applied to the payment of other claimants, including respondent Frank Everett & Company, who had taken an order from the contractors on Coffman, Dobson & Company, who in turn had assigned to them by the contractors all the money due the contractors from the state. As there was no notice of claim filed, obviously appellant would not be liable on its bond, and for this reason appellant maintains



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that the order given respondent Frank Everett & Company by the contractors was void because a contractor cannot assign funds to the exclusion of the rights of the surety, and the surety has a right to have the funds applied to the payment of claims for which it is liable. Whatever may be the rule as to the eighty per cent of the proceeds from the contract, it was settled by this court in *Northwestern Nat. Bank of Bellingham v. Guardian Casualty & Guaranty Co.*, 93 Wash. 635, 161 Pac. 473, that the reserve (which in this case is twenty per cent) is a trust fund for labor and material claimants and not subject to assignment.

In an attempt to avoid this rule, counsel for respondent Frank Everett & Company claim that, even granting that appellant has a right to an application of the reserved funds on claims for which it would be liable, nevertheless appellant is liable for respondent Frank Everett & Company's claim because it was composed of lienable items, even though no notice of claim was filed. This last assertion is obviously untenable, and we hold the assignment void as to appellant.

IV. Appellant also claims that the court erred in rendering a judgment in favor of respondent Coffman, Dobson & Company and allowing it to satisfy such judgment out of the funds paid into the registry of the court by the state. It appears that the contractors, in order to secure credit from respondent Coffman, Dobson & Company, assigned to it the proceeds due them from the state on the contract, and that respondent Coffman, Dobson & Company did loan certain moneys to the contractors, of which amount there was still due at the time of trial \$3,300 and interest. The wording of the judgment and the fact that respondent Coffman, Dobson & Company was allowed to satisfy it from the funds in court would seem to indicate that such judgment was based on the assignment. On the authority of *Northwestern National Bank of Bellingham v. Guardian Casualty & Guaranty Co.*, *supra*, appellant argues that the assignment is void and, therefore,

the judgment is void, as the money paid into court constituted substantially the twenty per cent reserve which is a trust fund and cannot be assigned as against the surety. Even if the theory of the trial court was erroneous, it matters not what theory it adopted as long as the conclusion is sound and the judgment can be sustained by the evidence. Respondent Coffman, Dobson & Company filed a timely notice of claim against the bond. The money loaned by it to the contractors was actually used for labor and materials and would entitle it to a valid claim against the bond by virtue of the rule announced in *Puget Sound State Bank v. Gallucci*, 82 Wash. 445, 144 Pac. 698, Ann. Cas. 1916A 767, wherein it was held that a surety is liable for moneys traceable to the work loaned to a contractor; and particularly would this be true where the evidence clearly shows that the money was applied in the payment of claims which the surety would have been required to pay had not respondent Coffman, Dobson & Company advanced the money with which they were paid. In 1915, the legislature passed an act, found in Rem. Code, §§ 1159, 1159-1, in which it was provided that money loaned to a contractor would not be a valid claim against the bond. In Rem. Code, § 1161-1, this statute was made retroactive. The bond and the contract between the contractors and respondent Coffman, Dobson & Company were executed prior to the enactment of these statutes, and if the retroactive feature thereof is constitutional, it is apparent that respondent Coffman, Dobson & Company has no valid claim against the bond. But we consider it unconstitutional because it impairs the obligation of a contract, violating § 23, art. I, Constitution of Washington. Respondent Coffman, Dobson & Company took the assignment from the contractors and gave them credit on the strength of the law as it then existed, which made it a recoverable claim against the bond. This law entered into and became a part of the contract, and for the legislature to later deprive the bank of its right of recovery against the bond deprives it of a substantial right which impairs the obli-

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gation of its contract and does not merely affect the remedy. *Strand v. Griffith*, 63 Wash. 334, 115 Pac. 512.

Respondent Coffman, Dobson & Company was, therefore, entitled to a judgment against appellant, and while technically the court should not have allowed it to satisfy this judgment out of the funds in court, the effect of allowing such a procedure benefits respondent Coffman, Dobson & Company in that it gets the actual money in place of a bare judgment. We do not consider that appellant is in a position to urge this objection, as it appears that there are more than enough valid claims to use up the money paid in court; and if the reserve would not go around, appellant would have to make up the deficit. It is not material to appellant to whom it paid the deficit so long as the reserve was properly applied on valid claims. If it injures any one it will be the other respondents with valid claims, but they are not complaining.

The judgment is therefore reversed as to respondent Frank Everett & Company, and in all other respects is affirmed.

ELLIS, C. J., PARKER, and MOUNT, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 13705. Department Two. July 16, 1917.]

**N. R. EYERS, *Respondent*, v. BURBANK COMPANY, *Appellant*.**<sup>1</sup>

**APPEAL—REVIEW—HARMLESS ERROR.** Error in refusing to strike certain allegations from the complaint is harmless where the court refused to permit any evidence thereon to go to the jury.

**FRAUD—ACTION FOR DAMAGES—COMPLAINT—SUFFICIENCY.** A complaint for false representations, alleging generally that the statements were false, is not demurrable for failing to state facts specifically showing wherein they were false, the remedy being by motion to make more definite and certain.

**FRAUD—ACTIONS—MEASURE OF DAMAGES.** In an action for fraud inducing a sale where the vendee never had title and was dispossessed for breach of condition, the measure of damages is not the difference between the value of the land and what it would have been if as represented, but he may recover his expenses and outlay in going upon and improving the land.

**FRAUD—ACTION FOR DAMAGES—COMPLAINT—FACTS OR CONCLUSIONS.** In an action for fraud, a complaint alleging false representations as to the value of the property sold need not allege such circumstances accompanying the representations as would make them statements of fact, where it is alleged that the representations related to material facts, that they were false and relied upon, and that plaintiff was damaged thereby.

**SAME—RELIANCE UPON REPRESENTATIONS—COMPLAINT—SUFFICIENCY.** In an action for fraud, a complaint sufficiently alleges, as against demurrer, the plaintiff's right to rely upon representations as to land at B. sold to him, where it states that he had no knowledge of the facts existing at B. and could not determine the truth or falsity of the representations until he had visited B. and not until the latter part of a growing season, although it does not show by particular facts that he had a right to rely thereon or was excused from investigation.

**APPEAL—REVIEW—HARMLESS ERROR.** Error cannot be predicated upon the opening statement of counsel in rehearsing incompetent facts he expected to prove, where the jury were instructed that the same was subject to the further action of the court in permitting him to introduce testimony and there was no showing that appellant was prejudiced.

**FRAUD—ACTION FOR DAMAGES—EVIDENCE—ADMISSIBILITY.** In an action for fraud in inducing plaintiff to purchase land, evidence is

<sup>1</sup>Reported in 166 Pac. 656.

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admissible of the representations concerning the land and the profits to be made therefrom, made to the plaintiff in a distant state by a soliciting agent, where, though to some extent immaterial, they all went to the matter of inducement leading up to plaintiff's conviction that statements made by the defendant after he came to see the land were true.

**SAME.** In such a case, it is immaterial whether the soliciting agent was an authorized agent, where the defendant afterwards made the same representations in such agent's presence.

**SAME.** In such a case, testimony of similar representations made to other witnesses in the same state by the soliciting agent, is admissible as corroborative, to some extent, as to plaintiff's reliance thereon.

**SAME—RELIANCE UPON REPRESENTATIONS—MAKING INVESTIGATION.** A purchaser may rely upon representations that land was well seeded to alfalfa and would produce seven to nine tons per acre the next season and was worth \$300 per acre, notwithstanding he visited the land and made an investigation, where it appears that he knew nothing about farming by irrigation, could not tell whether it was properly prepared for cultivation or well seeded and did not discover until next season that it was not properly prepared or seeded and would not grow a good crop of alfalfa, and was not worth to exceed \$100 per acre.

**APPEAL—REVIEW—HARMLESS ERROR.** Error in refusing to allow cross-examination of an adverse party as to a contract in issue is not ground for reversal where the contract was proved and subsequently admitted in evidence and the appellant was not prejudiced.

**SET-OFF AND COUNTERCLAIM — SUBJECT-MATTER — DAMAGES FOR FRAUD.** In an action for fraud in inducing a purchase of property, in which plaintiff was allowed recovery for expenses for permanent improvements made by him upon the land, which reverted to defendant, promissory notes indorsed by defendant, given for the performance of labor in the improvement of the property and to prevent liens attaching, are not proper subjects of counterclaim, where it was shown that they were not included in the improvements for which plaintiff was allowed damages.

**FRAUD—ACTION FOR DAMAGES—GOOD FAITH—EVIDENCE—ADMISSIBILITY.** In an action for fraud in inducing a purchase of land, it is not prejudicial error to exclude testimony referring to defendant's good faith in making representations in a pamphlet, where the statements therein show for themselves the purpose for which they were written and defendant testified very fully as to his purposes, sources of information, and good faith.

**FRAUD—ACTION FOR DAMAGES—REPRESENTATIONS BY AGENT—EVIDENCE—ADMISSIBILITY.** In an action for fraud in inducing a purchase of land, representations made by a broker working upon a commission basis are admissible, where his agency for the defendant was established circumstantially and an officer of the defendant made the same representations in the agent's presence when they and the plaintiff visited the land together.

**APPEAL—REVIEW—HARMLESS ERROR.** Prejudicial error cannot be predicated upon the admission of evidence to which no particular weight was attached and which does not appear to have prejudiced appellant in any way.

Appeal from a judgment of the superior court for Franklin county, Linn, J., entered May 9, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover damages for fraudulent representations. Affirmed.

*Gerard Ryzek and A. J. Elrod*, for appellant.

*Chas. W. Johnson*, for respondent.

HOLCOMB, J.—Respondent's second amended complaint, as it stood after a motion had been passed upon to strike various allegations in his preceding amended complaint, alleged, in substance, as follows:

(1) That, prior to January 1, 1915, the Burbank Company, a corporation of the state of Washington, employed representatives in the state of Wisconsin for the purpose of securing purchasers for lands situated in Walla Walla county, Washington.

(2) That, for the purpose of inducing respondent to enter into a contract for the purchase of lands, appellant represented to respondent that it had in growing alfalfa twenty acres of land, described therein, which was producing from seven to nine tons of alfalfa per acre, which land was under irrigation; that the Burbank Company had employment; that it had a herd of twenty dairy cattle; that all of those representations were made by the company's agents both in Wisconsin and in the state of Washington; that respondent did not have any knowledge of the facts existing at

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Burbank, and had no knowledge as to appellant's representations about facts hereinbefore stated, and could not determine the truth or falsity of the statements until respondent visited Burbank, and then not until the latter part of a growing season had expired; that respondent is, by occupation, a common laborer; that he was induced to invest under the appellant's representations, and that he was unversed in conditions existing at Burbank under the Burbank project; that he had no knowledge or information as to conditions nor as to the truth or falsity of the statements made by the appellant nor as to the land controlled by appellant.

(3) That the company further represented that the land described was of the reasonable and just value of \$6,000; that in truth and in fact the land was of the value of approximately \$2,000; that the respondent had no knowledge or information upon which to determine the truth or falsity of the statements of the defendant.

(4) That all of the representations so made by the appellant to the respondent were false, fraudulent, and the appellant had no reason to believe them true, and they were made for the purpose of damaging the respondent by inducing him to part with his money and savings, and for the purpose of further inducing him to sign a certain written agreement for the purchase of the described premises, which contract provides for the payment of \$6,000, with interest at the rate of six per cent per annum until paid, and for the further sum of \$70 per annum maintenance fee.

(5) That, relying upon appellant's representations, respondent moved from the state of Wisconsin to the tract at Burbank, and executed the contract as hereinbefore stated.

(6) That the respondent relied upon the representations made by appellant, which representations were false, fraudulent, and made for the purpose of defrauding respondent, and respondent, by reason of appellant's false and fraudulent representations, has been damaged in the full and just sums specifically itemized as follows: \$600 consideration for exe-

cution of the contract; \$250 expended in locating himself, his wife, and five children upon the land; \$500 personal labor in improving the premises; \$200 in labor performed by his family, principally his wife; \$500 loss of time during respondent's occupancy of the land (this item was withdrawn during the trial); \$700 expended in buildings and permanent improvements upon the land described; and \$490.90 expended in permanent improvements and buildings upon the land, due the White River Lumber Company for which that company has taken judgment against respondent and for which respondent is liable (this item was corrected during the trial to the sum of \$453.85); or a total demand (after withdrawal and corrections) of \$2,703.85, for which sum respondent demanded judgment.

After issue joined and a trial to the court and jury, the jury returned a general verdict for \$1,669.95 in favor of respondent, and answered interrogatories showing their findings to be based upon the following items within respondent's demands for judgment, as follows: As consideration for the execution of the contract under respondent's first item, \$75; as expenses for locating himself and wife and children upon the land under the second item, \$200; for personal labor of respondent in improvements upon the premises under the third item of damage, \$250; for labor performed by the family of respondent under the fourth item, \$25; for expenditures in building and permanent improvements upon the land under the fifth item, \$665; and under the sixth item, \$453.85.

Appellant demurred to the second amended complaint, especially demurring to paragraph 3 thereof, for the reason that it did not state facts sufficient to constitute a cause of action, and especially demurring to paragraph six and to each and every allegation of damage separately alleged for the reason that the same did not state facts sufficient to constitute a cause of action, and generally to the entire amended complaint for the reason that the same did not state facts sufficient to constitute a cause of action.



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The refusal of the court to strike the allegations contained in the complaint with reference to the fact that appellant had a herd of twenty dairy cattle and that it had employment, constitutes appellant's first ground of error. This claim is immaterial for the reason that the court refused to permit any testimony to go to the jury in support of those allegations, considering them allegations of merely promissory representations; and although the ruling of the court is criticised by respondent, he did not reserve error thereon. Those allegations were not material and should have been stricken, even though proof of such representations might have been introduced as promissory representations in support of the principal inducements alleged to have been held out by appellant to the respondent; but as bases of recovery, they have no standing and the court did not permit them to have.

The overruling of the demurrer to the second amended complaint constitutes appellant's second assignment of error. In support of this assignment, appellant strenuously urges that the allegations of the complaint were not sufficient, in that the complaint did not allege wherein the representations which were alleged to be false were false in fact, but stated only general conclusions that they were false; that the allegations of damage were not based upon the proper measure of damage. As to the first element of this contention, it is true that the allegations of falsity of the representations are general and there are no facts stated specifically as to wherein the representations were false. But the complaint alleges that the representations were all false, and that they were made without reason to believe that they were true and for the purpose of inducing the respondent to act upon them, and that he did so act to his damage.

While the complaint is somewhat deficient, it is not wholly defective. Where the allegations of a pleading state mere general conclusions or ultimate facts, the proper method of attacking such general allegations is to move for them to be

made more definite and certain instead of demurring generally to them. This was not done, and the appellant cannot now complain that the specific facts were not set forth. *Mills v. Rice*, 3 Neb. 76; *Morse v. Gilman*, 16 Wis.\* 504; *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147; Pomeroy, Code Remedies, § 443 and note.

In support of the second phase, as to the measure of damages alleged in the complaint being insufficiently and improperly pleaded, appellant cites much law to the effect that, in an action for deceit and fraud, the vendee has an election of remedies; that he may bring his action for a rescission of the contract or he may bring an action for damages for the fraudulent inducement, but that he cannot do both; that he has here elected to bring an action for damages for the fraudulent inducement, and that in so doing he waived his action for a rescission, and that the measure of damages for fraud and deceit is the difference between the value of the property at the time of the sale and what its value would have been if it had been as represented, citing many cases.

That is the true rule where the vendee retains possession and title of the property, and no better discussion of that rule has been made than can be found in *Tacoma v. Tacoma Light & Water Co.*, 17 Wash. 458, 50 Pac. 55, and *West v. Carter*, 54 Wash. 236, 103 Pac. 21. See, also, *Wilson v. New United States Cattle-Ranch Co.*, 73 Fed. 994; *Bunck v. McAulay*, 84 Wash. 473, 147 Pac. 33; 20 Cyc. 132; 14 Am. & Eng. Ency. Law (2d ed.), 182; Bigelow, Fraud, 627.

But these principles do not apply to the case under consideration. While it is not alleged in the complaint, it is shown by evidence introduced during the trial that appellant, about July 11, 1915, terminated the contract, presumably for an alleged breach of some condition subsequent, having previously taken possession of the land during June, 1915, about six months after the contract with respondent was made. This was later effected by the physical dispossession of the respondent by the sheriff. In any event, there

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was actual dispossession of respondent and repossession by appellant; and appellant, so far as possession of the land was concerned, was placed in more than *statu quo* before this action was begun. There could be no election of remedies on the part of respondent, because he was not in possession and had never had title to the land, and could only bring an action for damages for whatever misrepresentations had been made in inducing him to enter into the contract and go upon the land and use it for a time under the contract. The measure of damages cannot be the same as in a case where the vendee has retained title to the land. The vendee is entitled, as often stated, to the benefits of his bargain. Here he had no benefit of retaining the land and no option of remedies. 4 Sutherland, Damages (4th ed.), p. 4418; *Buckingham v. Thompson* (Tex. Civ. App.), 135 S. W. 652; *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25; *Hackney Mfg. Co. v. Celum* (Tex. Civ. App.), 189 S. W. 988; *Haener v. McKenzie*, 188 Mich. 27, 154 N. W. 59; *Stratton's Independence v. Dines*, 135 Fed. 449; *Hunt County Oil Co. v. Scott*, 28 Tex. Civ. App. 213, 67 S. W. 451; 14 Am. & Eng. Ency. Law (2d ed.), 179.

It is also urged that the allegation as to the representations of the value of the land was insufficient; that such statements are presumed to be expressions of opinion and are not generally actionable; that, if the pleader seeks to base an action upon them, he must show such circumstances accompanying the making of the representations as would make them statements of fact and actionable.

We held in *Tacoma v. Tacoma Light & Water Co.*, *supra*, that whether a representation as to value is merely an expression of opinion or an affirmation of a material fact to be relied upon is a question for the jury. We held in *Bunck v. McAulay*, 84 Wash. 473, 147 Pac. 33, that, under similar representations as to the value of property if the property had been as represented, its agreed value was the price fixed between the parties. There is no difference as to representa-

tions of value between real and personal property, and the basis of damages is the same.

It is claimed also upon this point that the complaint must show: (1) That representation was made by defendant or with his authority; (2) that it related to a material fact; (3) that it was false and wherein it was false; (4) that the plaintiff had a right to rely on it and did rely on it; (5) that plaintiff was damaged as the result of the representations, citing 12 R. C. L. 416, 422.

The complaint before us, while by no means to be commended as a model of pleading, does allege that the representations were made by the defendant or its agents; that the representations related to material facts; that they were false, though it does not sufficiently state wherein the representations were false; that the plaintiff relied on the representations; that the defendant had no reason to believe the representations when made were true; that the plaintiff was damaged as the result of the representations. Although the complaint failed to state wherein the representations were false, no proper and timely attack was made upon that, as we have heretofore stated.

As to the proposition that plaintiff had a right to rely on the representations, it is alleged that he did not have any knowledge of the facts existing at Burbank, and had no knowledge as to defendant's representations about the facts hereinbefore stated, and could not determine the truth or falsity of the statements until plaintiff had visited Burbank and then not until the latter part of a growing season had expired; that he was unversed in the conditions existing at Burbank; that he had no knowledge or information as to conditions nor as to the truth or falsity of the statements made by defendant, nor as to the land controlled by the defendant. In *Tacoma v. Tacoma Light & Water Co.*, *supra*, discussing a similar contention, it was said:

"Where the purchaser may know the truth by looking or where the truth is shown him, he is not misled, but where he

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relies upon the statements of the vendor, and has no knowledge that such statements are false, he can, when they are false, and he has been reasonably prudent, recover damages. If no knowledge of their falsity is presented to him, the purchaser may rely implicitly upon the statements of the vendor, if such statements are not so openly and palpably false that their untruth is apparent to an ordinarily prudent person."

The court there cited Pollock on Torts (Webb's Am. ed.), 377 to 379; Bishop on Non-Contract Law, § 337, and Bigelow on Fraud, 524, to the effect that, if the representations were of a character to induce action, or did induce it, that is enough. It matters not, it has been well declared, that a person misled may be said in some loose sense to have been negligent, for it is not just that a man who has deceived another shall be permitted to say to him, "You ought not to have believed or trusted me," or "You were yourself guilty of negligence." This indeed appears to be true, even of cases in which the injured party had in fact made a partial examination. That is the effect of the decisions, also, in *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. 1102; *Strand v. Griffith*, 97 Fed. 854; *George v. Kurdy*, 92 Wash. 277, 158 Pac. 965; and *Miller v. Gerry*, 81 Wash. 217, 142 Pac. 668.

Tested by these principles, therefore, while the allegations of the complaint do not show by particular facts that the respondent had a right to rely on the representations or was excused from investigation, the complaint is not thereby insufficient.

The question of the measure of damages as fixed by the complaint is the most difficult question raised under this assignment of error. We have alluded to the fact that the record of the case shows that the contract had been mutually rescinded by the action of the parties, and that respondent was not in possession and never had had title and that, therefore, he had no election of remedies. He did not sue upon a contract, but sued for damages for the deceit and fraud in inducing him to enter into a contract which had been there-

tofore entered into and thereafter rescinded. The question then presents this, what was the proper measure of damages in such case?

Respondent proceeded upon the theory that he was entitled to all the moneys which he paid out in faith of the contract and upon the land which he had lost. In *Bell v. Jovita Heights Co.*, 71 Wash. 7, 127 Pac. 289, vendees, who had made and entered into agreements for the purchase of certain property but had never received title and were not in possession, sued to recover back the money paid to the vendor upon the contract as part of the purchase price by reason of certain false and fraudulent representations made to them, and the court held that they could recover back such moneys as moneys had and received. That case would certainly apply to the first item of respondent's damages stated in the complaint, alleged to have been \$600 but allowed in the sum of \$75 which was the correct allowance. As to the other items, the evidence in the case fairly supports the recovery of all of them, and some of them conclusively, unless the measure of damages is improper. If respondent could not recover the difference between the value of the land at the time as it was represented to be and the actual value of it, which we think is manifest, then certainly he would be entitled to recover the moneys that he paid out upon the land in faith of the contract. It is shown by evidence in support of these items that he paid \$75 upon the execution of the contract as part of the purchase price and gave his notes for the remainder of the first payment, that he paid approximately the amount allowed by the jury for locating himself and wife and children upon the land, that his own personal labor in improving the land amounted to approximately the amount allowed by the jury, and that his wife performed some labor for which the jury allowed \$25; that the actual expenditures in building a house and barn and appurtenances upon the land in question amount to \$665, and that the actual price of the material for which the White River Lumber

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Company obtained judgment, referred to in the complaint, exclusive of costs, was \$453.85. These items we think recoverable under the peculiar situation shown in this case, if sustained by the evidence.

The third assignment of error relates to the denial of appellant's motion for judgment upon the pleadings. This matter is decided by our discussion of the sufficiency of the complaint.

We find no merit in the fourth assignment of error, that counsel for respondent in his opening statement to the jury was permitted to rehearse facts which were incompetent, immaterial, and prejudicial. Whatever counsel stated in the opening statement as to what he expected to prove was subject to the further action of the court in permitting him to introduce testimony, and the jury were so instructed. There is no showing that appellant was prejudiced by anything contained in counsel's opening statement to the jury.

The fifth assignment is based upon the admission by the court of testimony which appellant asserts to be irrelevant, incompetent, and immaterial. Over appellant's objections, the court permitted respondent, when on the stand, to testify as follows:

"He [referring to one Pember as agent] told me what good land there was here and what it would produce; he represented that I could handle at Burbank twenty acres, that the land was in alfalfa that would produce from seven to nine tons, and I could keep twenty dairy cattle that would produce ten dollars per month without any feed, and also produce a carload of hogs on milk and alfalfa without any feed, and we could produce that much every year. He figured the hogs as about forty hogs to the acre and fifteen dollars to eighteen dollars a head. He said that the land in the condition he was selling it would do that. He said the land would produce the same as somebody else's land shown in pictures in booklet. When he came to this particular piece of land, Mr. Chandler said it would produce from seven to nine tons of alfalfa. I spoke of it being in bad shape to produce that kind of stuff, and he said that after it had been

cleaned off it would look different and would produce that. He said that it would produce enough alfalfa for this dairy herd of twenty cows. At the time I came out here and paid the money down on the land, Mr. Chandler and Mr. Pember said there would be a stand of alfalfa, that they would produce on it seven to nine tons of alfalfa the first season that I lived there, and they said that that could be done. Mr. Pember told me that this land was producing seven to nine tons of alfalfa and I would get 140 tons of alfalfa."

This is a part of the testimony of respondent wherein he recited the entire story of how he was first approached by one J. W. Pember, who was shown at the trial to have been a soliciting sales agent for the appellant or a soliciting agent to bring prospective buyers to the appellant's place of business at Burbank, Washington, at his former place of residence in Wisconsin; that these inducements were held out to him, and that he came to Burbank some time in September, 1914, and there made a trip to the land with Pember and Mr. Chandler, the vice president and general manager of appellant; that in going over various tracts of land substantially the same representations were made to him by either Pember or Chandler, to the effect that there was a good stand of alfalfa on the land that they would sell him, that it would produce from seven to nine tons per acre the first year that he was on the land, that it was worth \$300 per acre, that he could make so much money out of it by keeping twenty dairy cattle and a certain number of hogs; and that, when they came to the particular tract of land which he contracted for, Mr. Chandler told him it would produce from seven to nine tons of alfalfa, that it would produce enough alfalfa for a dairy herd of twenty cows.

The other statements, in addition to those as to the land being well seeded to alfalfa, that it would produce the next year or the first year in which respondent would have possession of it seven to nine tons of alfalfa, and that thereby he could make certain profit by keeping certain stock and feeding them, while to some extent immaterial, all go to the mat-



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ter of the inducement leading up to the conviction of respondent that the statements made to him by Chandler after he came to see the land and at the time that he made the first payment on it, were true; that he had no reason to believe them otherwise, and that any representations made to him by Pember in Wisconsin, while they may have been made without authority, were reaffirmed by Chandler in effect, whereby he was induced to make the bargain. Such other representations, therefore, while not directly material, were not prejudicial, but were to be considered in the light of all the evidence as to whether or not respondent was deceived, whether he had a right to rely upon the representations made to him when he saw the land and when he bargained for it, and whether the representations were true.

Much discussion is also made by appellant in its brief as to the representations alleged by respondent to have been made by Pember in Wisconsin, and as to whether Pember was an authorized agent of appellant by reason of which appellant would be bound by any representations made by him. We consider that, whether or not Pember was an authorized agent when he made the representations alleged to have been made in Wisconsin, the same representations, in effect, were made by Pember in the presence of Chandler when respondent came to visit the land, and others were made by Chandler in the presence of Pember going to the material representations alleged in the complaint by respondent; so that it is immaterial whether or not Pember was an authorized agent when he went to respondent in Wisconsin and made certain representations to him.

There is complaint, also, as to the testimony permitted by witnesses Dell Roblee and his wife to the effect that Pember told them in Wisconsin that the land at Burbank was seeded to alfalfa, and that it would raise seven to nine tons to the acre. This testimony, also, while not directly material, corroborated respondent to some extent as to his reliance upon the representations, made to him when he came to see the

land, that the land was seeded to alfalfa and that it would raise seven to nine tons per acre and was worth \$300 per acre.

The material representations, if any, upon which respondent had a right to rely, were that the land which he was buying was all well seeded to alfalfa, would produce from seven to nine tons per acre the next season, and was worth \$300 per acre, or \$6,000, which he contracted to pay. These representations, in effect, if his testimony and his corroborating testimony are to be believed, were made by Chandler on his visit to the land, as well as by Pember.

It is true the evidence shows that respondent spent the greater part of two days, when he first visited the land in September, examining it and its surroundings; but his testimony is to the effect that he did not know anything about farming by irrigation; that he could not tell whether or not the land he bargained for was properly prepared for cultivation; that he could not tell whether or not the land was all seeded or whether it was well seeded; that he did not know anything about what the land would produce if well seeded; that he could not ascertain that fact at that time because the land had just been seeded according to their statements; that he could not ascertain the true facts until the next growing season. All his testimony shows that the next season he discovered that all of the land was not properly leveled and prepared so that it could be watered, but that there were spots which were not properly leveled and graded so that the water would run over it; that not only would those spots not grow the alfalfa on themselves, but that at larger spots around they would not grow it; that the land was not well seeded and would not grow a good crop of alfalfa, and did not that season, or ever, grow alfalfa on a large part of it; that it was not worth \$300 per acre and was not worth to exceed \$100 an acre.

We think, under such circumstances, the representations made were material and that the respondent had a right to

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rely upon them. Even if some examination is made by the purchaser but not a thorough and complete examination, the vendor is not always allowed to receive and retain the benefit derived from a fraudulent misrepresentation relied upon by the injured party. Respondent was wholly ignorant of the peculiar and artificial processes of cultivation by irrigation, its methods and results, and of the soil. *Tacoma v. Tacoma Light & Water Co.*, *supra*; *Holst v. Stewart*, 161 Mass. 516, 37 N. E. 755, 42 Am. St. 442.

The jury resolved the testimony upon these points in favor of respondent, and while we might have decided the facts otherwise, the verdict is supported by substantial evidence, and unless tainted by some undue influence or error, it is not to be set aside. This proposition is so well settled that no citation of authority is deemed necessary.

This disposes, also, of the effect of appellant's seventh assignment of error, that the court erred in denying appellant's motion for a nonsuit at the close of respondent's action.

The sixth assignment of error is that the court erred in refusing appellant the right of introducing, upon cross-examination of respondent, the contract mentioned in the pleadings. Appellant should have been permitted to examine respondent as an adverse party, either in cross-examination or during the examination of appellant's witnesses, as to any fact either directly or indirectly at issue. Rem. Code, § 1225, so provides, and this court has so decided in *Thomas v. Fos*, 51 Wash. 250, 98 Pac. 663. Such procedure ought now to be well recognized and well settled. But the appellant was not prejudiced or injured by this error of the court. The contract referred to was subsequently admitted and is a part of the record before us, and the actual date of the signing of it was proven by both appellant and respondent.

The eighth assignment of error is predicated upon the striking of certain items of counterclaim pleaded by appellant. These items were contained in paragraphs 3, 4, 5, 6, 7, 8, 9, and 12, and they were stricken upon the ground that

they were not matters which could be counterclaimed against the plaintiff's cause of action. Appellant now admits that paragraphs 2 and 7 contain matters not arising out of the contract or transaction set forth in respondent's complaint, and that they were properly excluded. They contend, however, that the other paragraphs contain counterclaims properly arising out of the contract or transaction set forth in respondent's complaint. These matters, as shown by the trial amendment made by appellant, were all based upon promissory notes given by respondent to various parties and indorsed by or assigned to the appellant, and were in each case for the performance of labor by the payee named therein at the special instance and request of the respondent in the improvement of the property described in the complaint, by the construction of fences, buildings and otherwise, the payment of all of which was guaranteed by appellant in order that statutory liens might not be enforced against the property. It was understood by the court at the time of striking those items of counterclaim that, if they were given for permanent improvements upon the land and were a part of the sum of \$700 which respondent sued for as one of his items of damage, then they would be appropriate matters to counterclaim; if not, they were not proper matters of counterclaim; and it was shown that they were not included in the \$700 item of damage. There was, therefore, no error in striking these counterclaims.

The ninth assignment of error is as to the admission in evidence of a judgment in favor of the White River Lumber Company against respondent, which is set forth as one of the items which respondent claimed the right to recover as an item of damage, the ground of objection being that it is not an element of damage. We have disposed of that in disposing of the demurrer to the amended complaint as a measure of damages.

The tenth claim of error relates to testimony referring to a pamphlet or booklet which was exhibited in evidence as the

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respondent's exhibit 1, being a pamphlet issued by the Burbank Company and written by Mr. Chandler, the vice president and general manager, and tending to show the good faith of the writer in publishing the book. The book itself, the admission of which was objected to by appellant, was properly in evidence as being some evidence of the representations and inducements made by the company and its officer and agent to respondent, and the statements therein contained showing for themselves what they were published for. Mr. Chandler testified very fully as to why he wrote the pamphlet and the sources of his information and his faith in its statements. We think there was no testimony excluded that was material or that would throw any further light upon it or his good faith.

The eleventh assignment of error, that the court erred in denying motion for directed verdict at the close of the case, has been virtually disposed of in considering previous assignments.

It is next claimed that the court erred in refusing appellant's requested instruction No. 1. By this proposed instruction, the court was requested to charge the jury to disregard and not consider any representations made by J. W. Pember, except such statements as they might find from the evidence were made in the presence of E. M. Chandler. It is strenuously contended that there was absolutely no proof of Pember's agency or of the extent of his authority, except his own declarations. It is contended that, while the record shows that Pember was a real estate broker employed to bring prospective purchasers to see the lands of the Burbank Company, working upon a commission basis, this does not constitute any such authorization as would bind the company by any representations or inducements he may have held out. But it is shown that Pember used the book heretofore mentioned and brought prospective purchasers to Burbank; that he went with respondent and Chandler to see the lands; that both he and Chandler made declarations of the same char-

acter to respondent; that Pember received commissions on such sales; that Pember received the first \$75 made as a payment by respondent upon the land he bargained for, and that it was applied by Chandler to the purchase price of the land. Whatever representations or inducements Pember may have made not in the presence of Chandler were to the same effect as those made in his presence, and the fact that Pember continued his solicitations and representations to respondent after the latter came to Washington and went to see the land, and in the presence of Chandler, is a circumstance tending to show that Pember was an agent of the company and, among the other circumstances, that he was authorized to make the representations alleged to have been made. It is true, however, that evidence of his declarations to respondent and other witnesses would not establish his agency or the extent of his authority. The agency and the scope thereof were, however, established circumstantially by other facts shown in the evidence, if the jury believed the evidence of such facts, and no representations are shown to have been made by Pember in Wisconsin widely at variance with the representations made by him in Washington in the presence of Chandler, and those made by Chandler himself. There is and can be no dispute that Chandler was a lawfully authorized agent; in fact, the general agent or general manager of the appellant. The court instructed the jury clearly and concisely that respondent was required, before he was entitled to a recovery, to establish by a fair preponderance of the evidence that the defendant, or its lawfully authorized agent acting in its behalf, made the representations alleged in the complaint. We think this was sufficient.

An error was claimed as to the admission of a certain newspaper advertisement by another firm advertising Burbank lands, exhibited and used by Pember and read by respondent, which constituted part of Pember's general representations. No particular weight was claimed to have been attached to it and presumably none was by either respondent

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or jury. At any rate, it does not appear to have prejudiced appellant in any way, even conceding that it should have been excluded from evidence.

What we have said as to other errors claimed disposes in effect of appellant's claim of error in regard to instructions refused by the court.

Appellant's last assignment of error, that the court should have granted a new trial, involves a consideration only of the claims of error previously discussed.

Finding no error in the record which will justify a reversal, the judgment is affirmed.

ELLIS, C. J., MOUNT, FULLERTON, and PARKER, JJ., concur.

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[No. 13724. Department Two. July 16, 1917.]

BURBANK COMPANY, *Appellant*, v. DELL ROBLEE,  
*Respondent*.<sup>1</sup>

ELECTION OF REMEDIES—INCONSISTENT REMEDIES—APPLICATION OF RULE. In an action upon a note for the purchase price of land, defended upon the ground of fraudulent representations inducing the purchase, the defendant cannot be required to make an election between rescission of the contract, prayed for in his first answer and cross-complaint, and damages for the fraud, where, by a subsequent answer and cross-complaint he alleged that the contract had been rescinded and annulled by plaintiff for breach of condition subsequent; since the first answer prayed for something that had already happened and he had no election.

Appeal from a judgment of the superior court for Franklin county, Linn, J., entered May 9, 1916, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Affirmed.

*A. J. Elrod and Gerard Ryzek*, for appellant.

*Chas. W. Johnson*, for respondent.

<sup>1</sup>Reported in 166 Pac. 663.

HOLCOMB, J.—The issues and questions involved in this case are almost identical with those in *Eyers v. Burbank Co.*, ante p. 220, 166 Pac. 656. In this case appellant brought an action against respondent on a \$900 note, dated January 4, 1915, in which respondent answered and set up a cross-complaint and alleged that the note was given for a deferred payment on the purchase price of thirty acres of land contracted to be purchased by respondent from appellant at the agreed price of \$300 per acre, and upon which \$900 note a payment of \$100 had been made at or before the time of signing the contract, and alleged representations in substance the same as those made and discussed in the *Eyers* case, his reliance and acting upon them, and that the representations so made and relied upon were false and known by appellant to be so, or not known to be true, and that he did not know and had no means of knowing their falsity. In his first answer and cross-complaint, among other things, he demanded damages itemized as in the *Eyers* case, and also that he be granted a decree cancelling and holding for naught the agreement of purchase and the notes therein referred to, and such other relief as might be just and proper.

Afterwards respondent filed an amended answer and cross-complaint, setting up substantially the same representations of fraud and deceit and items of damage, and omitting any demand for the cancellation of the contract and purchase money notes, and alleging therein as follows:

“That subsequent to the execution of said contract and at the time when the defendant was able to determine the falsity of such statements, to wit, in the growing season of 1915, the plaintiff having secured many benefits and improvements from the defendant cancelled the contract hereinbefore referred to for failure to pay maintenance fee, and ordered the defendant off the premises.”

This amended answer and cross-complaint was attacked by motion to strike certain portions thereof and to require defendant to elect whether he proceeded as for a rescission of the contract or for damages, to separately plead every cause



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of action and separate damage, and to set out a written copy of the agreement to purchase the land referred to; and a motion to strike all the items of damage, together with other motions. The court struck portions of the cross-complaint in substance the same as were stricken from the complaint in the *Eyers* case, and refused to strike certain portions thereof the same as the complaint in the *Eyers* case, refused to strike the items of damage alleged, refused to require defendant to elect, and refused to require him to file a complete copy of the written contract referred to.

Thereupon a second amended answer and cross-complaint was filed in compliance with the court's order, and to this plaintiff demurred, demurring separately to the fourth paragraph thereof and to each and every separate allegation of damage therein alleged for the reason that the same does not state facts sufficient to constitute a cause of action, and also demurred to the amended answer and cross-complaint as a whole for the reason that the same does not state facts sufficient to constitute a cause of action. The question of the sufficiency of the answer and cross-complaint was determined in effect in determining the sufficiency of the complaint in the *Eyers* case.

As to the election of remedies appellant strenuously insists that, when respondent filed his first answer and cross-complaint, he made his election for a rescission of the contract, which must be construed as final. But the subsequent answer and cross-complaint shows that the contract had theretofore, for an alleged breach of conditions subsequent, been annulled and rescinded by appellant. The amended pleading merely alleged the facts as they were. As was said in the opinion in the *Eyers* case, in such a situation the vendee had no election. The contract was already at an end. When, in his first answer and cross-complaint, he prayed for its rescission, he prayed for something that had already happened. He prayed for something that was unnecessary. As a vendee he had but one remedy available. His subsequent answers and

cross-complaints alleged the facts as to the prior determination of the contract by appellant itself. And the well settled principle of law insisted upon by appellant, therefore, as quoted from the case of *Gaffney v. Megrath*, 23 Wash. 476, 63 Pac. 520, that, where there exists an election between inconsistent remedies, a party is confined to the remedy which he first adopts, cannot apply here for the very obvious reason that there did not exist an election between inconsistent remedies.

All other questions are settled and determined by the decision in the *Eyers* case, to which for their discussion reference is hereby made.

We find no error sufficient to justify a reversal. Judgment affirmed.

ELLIS, C. J., MOUNT, FULLERTON, and PARKER, JJ., concur.

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[No. 14051. Department Two. July 16, 1917.]

THE STATE OF WASHINGTON, *Respondent*, v. S. WARBURTON,  
*Appellant*.<sup>1</sup>

INTOXICATING LIQUORS—ILLEGAL SHIPMENT—CRIMINAL LIABILITY—SHIPPER. One who, in the state of Illinois, delivers a shipment of liquor to a common carrier to be transported to this state, without having secured a permit as required by the prohibition law, Rem. Code, § 6262-1 *et seq.*, is criminally responsible therefor as a participant and instigator of the offense, if not as the actual shipper; there being no distinction between principals and accessories.

SAME—ILLEGAL SHIPMENT—CRIMINAL LIABILITY—ACTS OF AGENT. One who ships liquor into this state in violation of the prohibition law, through the instrumentality of an agent, is liable as though he had personally participated, although out of the jurisdiction; and a common carrier may be made the agent in this sense.

SAME—ILLEGAL SHIPMENT—JURISDICTION—VENUE. The shipment of liquor into this state in violation of the prohibition law, through the instrumentality of a common carrier, is a continuing act, cognizable in the jurisdiction where the shipment terminated, and the venue is properly laid at the place of termination.

<sup>1</sup>Reported in 166 Pac. 615.

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**SAME—ILLEGAL SHIPMENT—STATUTES — CONSTRUCTION—“WITHIN” AND “INTO.”** Rem. Code, § 6262-18, prohibiting the shipment of liquor “within” the state without first securing a permit therefor, prohibits shipments “into” the state, in view of the evident intent and purpose of the act as a prohibition measure supplanting former regulative provisions, the act providing with particularity how a permit may be obtained to ship liquors from places outside the state into the state.

**STATUTES—EXECUTIVE CONSTRUCTION.** Executive construction of an initiative measure, while not a controlling circumstance, is persuasive as to its proper meaning.

**COMMERCE—INTERSTATE COMMERCE—INTOXICATING LIQUORS—STATE REGULATION.** The prohibition initiative measure (Laws 1915, p. 2) relating to intoxicating liquors, in so far as it regulates shipments into the state, is not an unlawful interference with interstate commerce; since, by the Webb-Kenyon act, 37 U. S. Stat. at L., p. 699, ch. 90, Congress, in declaring unlawful the shipment of intoxicating liquors into a state to be received, possessed, sold or used in violation of any law of such state, has divested intoxicating liquors of their interstate character in so far as the power of the state to regulate the sale and disposition is concerned.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered October 31, 1916, upon a trial and conviction of unlawfully importing liquor into the state. Affirmed.

*S. Warburton and Boyle, Brockway & Boyle*, for appellant.

*Fred G. Remann and Geo. M. Thompson*, for respondent.

**FULLERTON, J.**—The appellant, while in the city of Chicago, Illinois, on his way to Tacoma, Washington, purchased nineteen gallons of whiskey and placed the same in a trunk which he checked with a railway company at Chicago for carriage to Tacoma as ordinary baggage. The trunk with its contents was carried by the railway company to Tacoma. The appellant on his arrival at Tacoma paid the excess baggage charges and delivered the baggage check to a transfer company with directions to procure the baggage and convey it to his place of residence in that city. The appellant had

no permit to import liquors within or into the state, nor was any permit such as is provided by the statute known as Initiative Measure No. 3 (Rem. Code, § 6262-1 *et seq.*), attached to the trunk containing the liquor. The appellant did not have or acquire personal possession of the liquor in the state of Washington. Prior to the time he delivered the baggage check to the transfer company, it had been seized by the officers of the law under a search warrant, and has not since been delivered to him. Shortly after the seizure, the appellant was arrested on a warrant from a justice's court of Pierce county issued on a complaint charging:

"That on the 14th day of June, 1916, at Tacoma, in Pierce county, state of Washington, John Doe then and there being did then and there unlawfully ship into the state of Washington intoxicating liquor without having attached to the parcel containing said liquor a permit as required by law, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Washington."

To the complaint, the appellant entered a plea of not guilty, and was tried thereon, the trial resulting in a judgment of conviction. From the judgment the appellant prosecuted an appeal to the superior court, where he was again convicted and adjudged to pay a fine. From the last mentioned judgment, the present appeal is prosecuted.

Noticing the assignments of error in the order in which they are presented by the appellant's learned counsel in their brief, the first is that there is a fatal variance between the charge and the proofs. Attention is called to the fact that the complaint lays the venue of the offense in the state of Washington, and it is argued that the appellant's connection with the shipment ceased in the state of Illinois when the appellant delivered the trunk containing the liquors to a common carrier in that state to be brought into the state of Washington as a part of his baggage, and in consequence there is no evidence to sustain the charge that the appellant shipped the liquor into the last named state. Stated in an-

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other form, the contention is that the appellant is not liable to answer for the act of the common carrier, notwithstanding he was a party to the act and the instigator and cause of the act. But this is not the rule. In criminal law, all participants, however so participating, are actors. One who procures the commission of an offense, or counsels, aids, or abets another in its commission, is a participant therein and equally guilty with the actual perpetrator of the offense. On this principle, a person is criminally answerable for the commission of an unlawful act which he causes to be done through the agency of another. So here, if it be in violation of the laws of the state of Washington to ship intoxicating liquor therein in the manner in which this liquor was shipped, the appellant is criminally liable therefor, if not as the actual perpetrator of the offense, then as the procuring cause of such offense and as an aider and abettor therein. We think it plain, also, that the state of Washington had jurisdiction of the offense and that the venue of the offense was properly laid in Pierce county. The act was essentially a continuing act whose performance was begun when the liquor was delivered to the carrier in the state of Illinois for shipment, and was completed when it was carried to its destination in the state of Washington. As a continuing act extending over different jurisdictions, it is cognizable as an offense in that jurisdiction whose laws are violated by the commission of the act.

These principles are so well understood as hardly to require authority for their support. At common law, in misdemeanors there are no accessories; all concerned are principals, whether instigators, perpetrators, or aiders and abettors of the criminal act; Wharton's Criminal Law (8th ed.), § 261; and by statute in this state the principle is extended to felonies; Rem. Code, § 2260. The authorities are all to the effect that a principal who procures an unlawful act to be done through the instrumentality of an agent is as much liable as if he actually and personally participated therein;

Wharton's Criminal Law (8th ed.), § 266; and this, though he may have procured the act to be done while out of the jurisdiction against which the offense is committed; *Id.*, § 288. It is uniformly held, also, that a common carrier may be made the agent in this sense. *State v. Intoxicating Liquors*, 98 Me. 464, 57 Atl. 798; *State v. O'Neil*, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557; *Pilgreen v. State*, 71 Ala. 368; *United States v. Freeman*, 239 U. S. 117.

The last cited case is authority, moreover, for the proposition that the transportation of intoxicating liquors through the instrumentality of a common carrier from one jurisdiction to another is a continuing act, cognizable in the jurisdiction where the shipment terminated. That was an indictment under the Federal criminal code making it a punishable offense to ship from one state into another any package containing intoxicating liquor unless the package be so labeled on its outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity of liquor contained therein. The liquor was delivered to the carrier at Joplin, Missouri, in six unlabeled trunks to be carried into Cherokee county, Kansas. The indictment was returned in the district of Kansas, and the defendant moved to quash for want of jurisdiction, contending that the offense denounced by the statute was complete when the liquors were delivered to the carrier for shipment, and therefore cognizable only at the place of shipment and not cognizable at the place of destination where the indictment was found. The trial court sustained the contention, but its judgment was reversed on the appeal, the court holding that the act of shipment was a continuing act and hence cognizable in the district court of Kansas.

The principles announced in these authorities clearly lead to the conclusion that there is no variance between the charge and the proofs, and that jurisdiction over the offense is vested in the courts of Pierce county, the place of termination of the shipment.

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The second contention is that the act in question does not and was not intended to regulate or prohibit the shipments of liquor from points outside of the state into the state, but was intended to and does in terms regulate and prohibit intra-state shipments only; that is, shipments from one point within the state to another point therein. But while the section of the act containing the prohibition uses the word "within" instead of the word "into" in prescribing the conditions upon which shipments of intoxicating liquors may be made (Laws 1915, p. 2, ch. 2, § 18; Rem. Code, § 6262-18), we have no doubt that the word was used in the latter sense. Any other construction would render the act meaningless. If it is permissible to ship such liquors from points without the state into the state without restrictions as to manner or quantity, the act is useless as a restrictive or prohibitive measure. It simply opens the doors to an unrestrained traffic in intoxicating liquors, doing away with the regulative provisions which the law theretofore threw around it. The act is not to be given that interpretation unless no other alternative is presented. It is true, as the appellant argues, the ordinary meaning of "within" is not "into," but the courts in construing the meaning of statutes are not confined to nice discriminations as to the meaning of particular words. Statutes are construed according to their evident intent and purpose, and if a word is found therein which, when given its literal meaning, leads to the absurd result of destroying the purposes of the act, the courts will give it a substituted meaning. This is but saying that, when the purpose and well ascertained object of a statute are inconsistent with the precise words, the latter must yield to the controlling influence of the legislative will resulting from the act as a whole. A reading of this act as a whole leaves no doubt as to its evident intent. It not only prohibits shipments of intoxicating liquor without a permit, but provides with minuteness and particularity how a permit may be obtained to ship liquors from places outside

of the state into the state, provisions wholly senseless if the unrestricted importation of such liquors was contemplated.

The construction we have put upon the act is the construction put upon it by the *Attorney General* of the state and by the executive officers who are charged with the duty of its enforcement. Permits for the importation of the limited quantities prescribed by the act are constantly being issued by the county auditors charged with the duty of issuing permits, and while this is not a controlling circumstance, it is at least persuasive as to its proper meaning. It is well to remember in this connection that this is an initiative measure, framed and adopted by the people apart from the legislature proper, and that it is the officers elected by the people who have given it this construction. See, also, *State v. Great Northern R. Co.*, ante p. 137, 165 Pac. 1073, 167 Pac. 1117.

The final contention is that, to construe the act as prohibitory of the importation of intoxicating liquors without a permit from places outside of the state to places in the state, is to render it obnoxious to the commerce clause of the Federal constitution. This question we shall not discuss at length. Whether the act is in violation of the clause of the constitution cited depends upon the meaning given to the act of Congress of March 1, 1913, known as the Webb-Kenyon act (37 U. S. Stat. at L. p. 699; U. S. Comp. St. 1916, § 8739). It is a Federal question ultimately determinable by the supreme court of the United States. A number of cases involving the proper interpretation of the act have been before that court, the latest of which is the case of *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, Ann. Cas. 1917B 845, L. R. A. 1917B 1218. In that case, as we read it, the court holds the act to be constitutional, and construes it as authorizing legislation by the several states prohibiting, regulating, or controlling the interstate shipment or transportation of intoxicating liquor. This being the meaning of the act, it authorizes the legislation under which the appellant is prosecuted. This is in accord with the conclusion reached by us in



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the case of *Gottstein v. Lister*, 88 Wash. 462, 153 Pac. 595, wherein the constitutionality of the initiative measure was attacked. Speaking of the Webb-Kenyon act, we there said, at page 514:

“Nothing could seem plainer than that, by the terms of this act of Congress, the dealing in and shipment of intoxicating liquors are no longer exempt in any degree from state regulation by the fact that such liquor may be an article of interstate commerce. In other words, intoxicating liquors are, by the terms of this act, divested of their interstate character, in so far as the power of the state to regulate the sale and disposition thereof, and the shipment into the state for that purpose, is concerned.”

Our conclusion is that the judgment of conviction must stand affirmed. It is so ordered.

ELLIS, C. J., PARKER, MOUNT, and HOLCOMB, JJ., concur.

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[No. 14068. Department Two. July 16, 1917.]

THE STATE OF WASHINGTON, *Respondent*, v. HARRY CHASE,  
*Appellant*.<sup>1</sup>

CRIMINAL LAW—APPEAL—REVIEW—VERDICT. A conviction will not be set aside for insufficiency of the evidence where it cannot be said that the evidence fails to support it.

Appeal from a judgment of the superior court for Grays Harbor county, Abel, J., entered November 20, 1916, upon a trial and conviction of grand larceny. Affirmed.

*Chas. W. Smith*, for appellant.

*W. H. Tucker*, for respondent.

PARKER, J.—The defendant, Harry Chase, was convicted of the crime of grand larceny, by the verdict of a jury in the superior court for Grays Harbor county. Judgment was rendered thereon sentencing him to serve a term in the penitentiary, from which he has appealed to this court.

<sup>1</sup>Reported in 166 Pac. 615.

The only contention made by counsel for appellant in this court is that the evidence introduced was not sufficient to sustain the verdict and judgment. A careful reading of the record, including the statement of facts, convinces us that we would not be warranted in disturbing the verdict and judgment upon this ground. The statement of facts is in narrative form and contains considerable argumentative matter. It states the conclusions of the one who prepared it rather more than the facts as testified to by the witnesses, to the extent that we are unable for the most part to tell just what the witnesses testified to. We cannot say that the evidence fails to support the conviction. The judgment is therefore affirmed.

ELLIS, C. J., FULLERTON, MOUNT, and HOLCOMB, JJ.,  
concur.

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[No. 14072. Department Two. July 16, 1917.]

THE STATE OF WASHINGTON, *on the Relation of Moore &  
Company, Plaintiff*, v. THE SUPERIOR COURT FOR  
KING COUNTY, *Respondent*.<sup>1</sup>

APPEAL — DECISION — PROCEEDINGS AFTER REMAND — NEW TRIAL —  
"FURTHER PROCEEDINGS." Where a judgment on the merits denying  
foreclosure of a mortgage was, on trial *de novo*, reversed and re-  
manded "for further proceedings," the merits of the matter are  
foreclosed and the lower court has no power to grant a new trial or  
take any steps beyond the further proceedings incidental to carrying  
out the foreclosure.

Application filed in the supreme court March 28, 1917, for  
a writ of prohibition to the superior court for King county,  
Frater, J., to restrain the granting of a new trial. Granted.

*Farrell, Kane & Stratton*, for plaintiff.

*Bausman, Oldham & Goodale* and *F. C. Kapp*, for respondent.

<sup>1</sup>Reported in 166 Pac. 628.

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Opinion Per Curiam.

**PER CURIAM.**—This is an application in this court for a writ of prohibition to restrain the superior court of King county and the Honorable A. W. Frater, the judge thereof, from granting a new trial in the case of Moore & Company v. Burling, after remittitur from this court on reversal of the lower court on appeal.

The original action in the lower court sought the foreclosure of a mortgage, executed by defendant Burling to secure a promissory note given to the Charleston National Mining Company. The note and mortgage had been purchased by the plaintiff corporation. The defense set up was that the note and mortgage were unenforceable on the ground of fraud on the part of the mining company in securing their execution by defendant, and that the plaintiff had purchased the note and mortgage with knowledge of the defect in the payee's title. The lower court found for defendant on these issues, and the cause was appealed to this court. A fuller statement of the facts will be found in the opinion of this court as reported in the case of *Moore & Co. v. Burling*, 93 Wash. 217, 160 Pac. 420. The cause being here for trial *de novo*, this court sustained the finding of the lower court as to fraud in the procurement of the execution of the instruments, but held that knowledge on the part of the plaintiff of the payee's fraud was not sufficiently established to sustain the finding of the lower court to that effect. The cause was remitted to the lower court under the following mandate: "The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion." After the cause was remitted to the lower court, the defendant filed a motion for a new trial on the issue as to whether plaintiff was a purchaser in good faith. The plaintiff moved to strike this motion, which motion the trial court overruled and denied. Thereupon the plaintiff applied for a writ of prohibition to restrain the lower court from proceeding to a hearing of the motion. The question suggested is the meaning of the mandate of this court.

Under the jurisdiction of this court to try equitable actions *de novo* on appeal, we examined and passed upon all the evidence in the record, and clearly indicated in our opinion that, while the procurement of the note and mortgage was founded in fraud, there was no sufficient proof establishing that the plaintiff was otherwise than an innocent holder in due course for value. This necessitated a reversal, and was tantamount to a finding in favor of the plaintiff's right of foreclosure, upon which we might have directed the entry of a decree to that effect. But there were minor matters connected with foreclosure proceedings, such as the allowance of a proper attorney's fee and the taxation of costs, which were more properly cognizable in the trial, than in the appellate, court. Except as to the one issue of fraud in the inception of the note and mortgage, which we found in defendant's favor, we unequivocally decided that the note was negotiable, that plaintiff was a purchaser in good faith, and that it was entitled to recover the full sum of the note though it had paid less than the face of it. Our decision disposed of all the issues bearing on plaintiff's right of recovery, and there is no justification in the opinion for the conclusion that the remittitur of the case for further proceedings meant the opening up in the lower court of the questions decided by us on the record presented. It is self-evident from the opinion rendered that our use of the words "remanded for further proceedings" had no other application than the carrying out of the proper foreclosure proceedings by the lower court.

In *Richardson v. Sears*, 87 Wash. 207, 151 Pac. 504, where the lower court modified a decree other than as directed by this court, we say:

"We have held in a long line of cases that the trial court, after an appeal and remittitur, has no power to enter any other judgment or decree in the cause than that directed by the appellate court. *Pacific Drug Co. v. Hamilton*, 76 Wash. 524, 136 Pac. 1144; *German-American State Bank v. Sullivan*, 50 Wash. 42, 96 Pac. 522; *State ex rel. Jefferson*

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*County v. Hatch*, 36 Wash. 164, 78 Pac. 796; *State ex rel. Wolferman v. Superior Court*, 8 Wash. 591, 36 Pac. 443."

The respondent admits that the lower court has no power to do other than obey the mandate of this court, and then proceeds to argue that the form of our mandate was the grant of a discretion to the lower tribunal, citing authorities from other jurisdictions wherein it is held that such a mandate warrants a new trial in the lower court. There are doubtless numerous instances when such an inference might naturally arise from the nature of the questions before an appellate court and its method of disposing of them. While it is the practice in this court in remanding an action necessitating a new trial to so distinctly state in its mandate, we would not deny the right to a new trial under a suitable mandate for further proceedings after reversal, if it was fairly apparent from our discussion of the case that the cause was remanded with that object in view. But where all the issues in an appealed case are finally disposed of by the supreme court, no warrant for reopening any of them can be found in its order remanding the case for further proceedings.

The application of the relator for a writ of prohibition to restrain the superior court of King county, and A. W. Frater, the judge thereof, from granting a new trial in the case of Moore & Company, a corporation, against Nettie E. Burling and others, is granted.

[No. 14122. Department Two. July 16, 1917.]

FULLER & COMPANY, *Respondent*, v. ROBERT LONGMIRE, *as Sheriff, Garnishee, Appellant*, ARTHUR J. ADAMS, *Defendant*.<sup>1</sup>

**ESTOPPEL—EQUITABLE ESTOPPEL—OWNERSHIP OF GOODS.** Where a mother allowed her minor son to conduct a business and use therein personal property which she had loaned to him, and to mortgage and hold himself out as the owner thereof, she is estopped, as against his creditors, from asserting that she was the owner thereof.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered July 10, 1916, upon findings in favor of the plaintiff, upon an issue in garnishment. Affirmed.

*H. W. Lueders*, for appellant.

*Raymond J. McMillan* and *Ernest K. Murray*, for respondent.

**PARKER, J.**—This action was commenced in the superior court for Pierce county by the plaintiff, W. P. Fuller & Company, seeking recovery of the purchase price of goods sold by it to the defendant, Arthur J. Adams. Thereafter a writ of garnishment was issued in the action at the instance of the plaintiff, directed to Robert Longmire, sheriff of Pierce county, requiring him to answer as to property in his possession belonging to the defendant. He answered the writ admitting that he had in his possession certain personal property, describing it, claimed by the plaintiff to be the property of the defendant, but alleged that it was in fact the property of Carrie Adams, the mother of the defendant. This allegation of ownership of Carrie Adams was controverted by the plaintiff. Thereafter the issue so raised was tried by the court together with the issues raised by the pleadings in the original action, resulting in findings and judgments in favor of the plaintiff as against both the original and garnishee

<sup>1</sup>Reported in 166 Pac. 623.

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defendants. The court directed the sale of the property in the hands of Longmire as garnishee defendant and the proceeds thereof applied to the payment of the judgment rendered against the original defendant. From this disposition of the cause, the garnishee defendant Longmire has appealed to this court. The original defendant Adams has not appealed, so the controversy here is only between the plaintiff and Longmire as garnishee defendant.

It appears that the defendant Adams was, at the time of purchasing the goods for the purchase price of which judgment was rendered against him in respondent's favor, a minor about twenty years old. At the time of purchasing the goods, he was carrying on the business indicated by the name Crystal Mirror & Beveling Company. The goods were sold to him by respondent for use in that business. The business was being carried on by him as his own, he having entire control thereof with knowledge and consent of his mother, who was then his natural guardian, his father having died sometime previous. This property in the hands of appellant as garnishee was property used in the business and had been seized by appellant as sheriff in proceedings looking to the foreclosure of a chattel mortgage thereon, which had been executed by defendant Adams, which property remained in appellant's possession at the conclusion of the foreclosure proceedings. It was claimed by Mrs. Adams as her property, she claiming that it had been loaned by her to her son for use in the business, and it was because of this claim made by Mrs. Adams that appellant resists the claim of the plaintiff that it be sold to satisfy the judgment against defendant, Arthur J. Adams. Mrs. Adams was not a party to the original action nor to this garnishment proceeding. The trial court found that:

"Carrie Adams is and was the mother of the defendant Arthur J. Adams, and at all times was informed and knew that said Arthur J. Adams was holding himself out as the owner of the personal property above described, and that he

was conducting the business of said Crystal Mirror & Beveling Company as his own and obtaining credit therein, and said Carrie Adams by her conduct is estopped to assert as against the plaintiff that said Arthur J. Adams is not the owner of said personal property."

This finding, we think, is amply supported by the evidence. Plainly, we think, whatever right to this property Carrie Adams may have as against her son Arthur J. Adams, it must be held to be his property so far as the rights of the plaintiff in this cause are concerned.

Some other contentions are made by counsel for appellant. We think they are wholly without merit so far as the present controversy is concerned. We may observe that they relate for the most part to questions arising in the original action and not to questions arising between respondent and appellant. We are not here concerned with alleged errors occurring in the rendering of the judgment against the defendant Arthur J. Adams, since no appeal is taken therefrom.

The judgment against appellant Longmire as garnishee is affirmed.

ELLIS, C. J., FULLERTON, MOUNT, and HOLCOMB, JJ., concur.



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Opinion Per FULLERTON, J.

[No. 14242. Department Two. July 16, 1917.]

KAMEO KAWABE, *Respondent*, v. CONTINENTAL LIFE  
INSURANCE COMPANY, *Appellant*.<sup>1</sup>

APPEAL—JURISDICTION OF APPELLATE COURT—NEW TRIAL ON EXTRINSIC MATTERS. The appellant cannot move for a new trial, either below or in the supreme court, during the pendency of an appeal, which lodges exclusive jurisdiction in the supreme court and must be disposed of on the record before a rehearing can be asked on matters extrinsic of the record.

Motion filed in the supreme court June 7, 1917, to vacate a judgment pending appeal therefrom. Denied.

*Karr & Gregory*, for appellant.

*J. B. Keener and J. Chas. Dennis*, for respondent.

FULLERTON, J. — The respondent, Kameo Kawabe, on March 2, 1917, obtained a judgment against the appellant, Continental Life Insurance Company, upon a policy of insurance for the death of his wife. The cause was by appeal removed to this court on May 16, 1917. While the cause was pending in this court, appellant moved in the superior court for a vacation of the judgment on the ground of newly discovered evidence. The trial court refused to consider the motion, holding that it had lost jurisdiction of the action. The appellant now moves this court to vacate the judgment and grant a new trial in the court below on the ground of "newly discovered evidence material for the defendant which it could not with reasonable diligence have discovered and produced at the trial of said cause." The motion further recites:

"This motion is made in the supreme court of the state of Washington for the reason that the superior court of Pierce county, Washington, has refused to consider the same, basing the refusal on the ground that it has lost jurisdiction in the above matter."

<sup>1</sup>Reported in 166 Pac. 617.

It is the settled rule in this state that an appeal lodges jurisdiction of the action exclusively in the appellate court, and that the lower court has no jurisdiction other than to do those things necessary or specially provided by statute for making the appeal effective. *Aetna Ins. Co. v. Thompson*, 34 Wash. 610, 76 Pac. 105; *State ex rel. Mullen v. Superior Court*, 15 Wash. 376, 46 Pac. 402; *Canada Settlers' Loan & Trust Co. v. Murray*, 20 Wash. 656, 56 Pac. 368.

It is the rule also that this court, being a court of appellate jurisdiction, must determine the cause upon the record as made. It has no power to grant new trials, open the cause for further evidence, or authorize the trial court to do so while it still retains jurisdiction of the cause. The appellant's remedy, if any it now has, necessitates a disposal of the cause in this court before it may ask a rehearing of the cause on matters extrinsic of the record. *Denny-Renton Clay & Coal Co. v. Sartori*, 87 Wash. 545, 151 Pac. 1088.

The motion is denied.

ELLIS, C. J., PARKER, MOUNT, and HOLCOMB, JJ., concur.

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Statement of Case.

[No. 13411. *En Banc*. July 17, 1917.]

PACIFIC TELEPHONE & TELEGRAPH COMPANY *et al.*,  
*Appellants*, v. THE CITY OF EVERETT *et al.*,  
*Respondents*.<sup>1</sup>

LICENSES — POLICE POWERS — REGULATING PUBLIC CORPORATIONS—TELEGRAPH AND TELEPHONE COMPANIES—CHARGE FOR POLES. The provision in a city charter and ordinances requiring telegraph and telephone companies to pay a license tax of fifty cents for each pole maintained in use in any street or alley of the city cannot be sustained as a police regulation under the rule that a city has power to exercise control over the business and occupations of public corporations where reasonable necessity exists and charge the reasonable cost thereof, where there was no law, charter, or ordinance providing for any regulation or supervision over the property of such corporations; since the tax or charges must be reasonably commensurate with the expense of regulation and in pursuance of some general or special statute or ordinance prescribing the purposes to which they were applied.

SAME—"OCCUPATION TAXES"—WHAT ARE—CHARGE ON TELEGRAPH AND TELEPHONE POLES. A charge of fifty cents for each telegraph or telephone pole maintained for use in any city street or alley is not a tax upon occupations or business, under the rule in this state authorizing license taxes thereon in addition to general taxation; since it does not purport to be such, and the amount is not graduated by the amount of business done, nor is the sum fixed for the privilege of doing business.

CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF FRANCHISE—TELEGRAPH AND TELEPHONE COMPANIES. A charge of fifty cents for each telegraph or telephone pole maintained for use in any city street or alley is a rental which may be charged by the city for the privilege of using the streets only by way of contract; and after a city has granted a franchise to a telephone company granting it the right to use its streets and alleys for the erection of poles without exacting any charge upon the poles as a condition precedent to their maintenance, and the franchise has been accepted and acted upon, the city cannot, by charter or ordinance, exact such a charge, since it would be impairing the obligation of the contract in violation of the Federal constitution.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered November 18, 1915, dis-

<sup>1</sup>Reported in 166 Pac. 650.

missing an action to restrain the enforcement of an ordinance, upon sustaining a demurrer to the complaint. Reversed.

*Hughes, McMicken, Dovell & Ramsey* and *Otto B. Rupp*, for appellants.

*Wm. A. Johnson*, for respondents.

FULLERTON, J.—On May 12, 1896, the city council of the city of Everett, by ordinance duly enacted, granted to the appellant Sunset Telephone and Telegraph Company a franchise, subject to certain conditions and regulations, empowering it to erect and maintain within the corporate limits of the city named a telephone and telegraph system. The ordinance, omitting its formal parts, is as follows:

“Section 1.—There is hereby granted to the Sunset Telephone and Telegraph Co., its successors and assigns, the right to erect poles and stretch thereon wires and similar conductors for the transmission of electricity within the city of Everett, and maintain the same for telephone and telegraph purposes.

“Section 2.—Such wires and conductors shall be stretched on said poles at a sufficient height as not to interfere with the free use of the streets and alleys by the public, and the poles shall be erected at the edge of the sidewalk and at such points as shall be designated by the city council, and shall keep the poles painted and substantially erected.

“Section 3.—The said grantee may make such excavations in the streets and alleys necessary for erecting and repairing such poles and wires, subject at all times to the rules, ordinances and resolutions of the city council, and the said council shall reserve the right to cause said grantee, its successors and assigns, to move the location of any pole, wire and conductors wherever it deems the public interest shall require the location elsewhere having due regard to the equities of the parties concerned; the expense of such removal to be borne and paid for by the grantee.

“Section 4.—The wires and conductors shall be promptly [properly] insulated, and carefully and firmly fastened, so as not to come in contact with any object, and whenever the surface of the streets or alleys shall be broken by any excava-

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tion or repairs, the grantee shall immediately restore same to its proper condition.

“Section 5.—Whenever any person has obtained permission from the city to move any building or structure, said grantee shall upon twenty four hours notice in writing, raise or remove wires or conductors to permit the free passage of such building and upon refusal of grantee to make compliance of such notice, the street commissioner shall, upon proof of such notice, raise such wires or conductors at the expense of the grantee.

“Section 6.—The grantee shall not charge its patrons for putting in its telephones and shall never charge monthly rentals in excess of rentals charged by grantee in any city of like population on Puget Sound but nothing shall prevent the grantee requiring its patrons to pay at least three months in advance from first connecting such telephones.

“Section 7.—Nothing herein shall be construed to prevent the city of Everett and its proper authorities from sewerage, guttering, or improving its streets and alleys and for that purpose to require the grantee to remove its poles, wires and connections to conform thereto and facilitate the same; and nothing herein shall be construed to grant to grantee, its successors and assigns, an exclusive right to erect and maintain its poles, wires, conductors and connections for the purpose specified herein;

“Section 8.—The grantee, its successors and assigns, is hereby given permission to place all or any of its wires underground at any time, and when the city of Everett has grown to a population of twenty-five thousand the wires of said grantee must be placed underground within such limits as may be deemed reasonable by the council. The grantee in doing any underground work is to carry out the same in expeditious and workmanlike manner subject to the ordinance and police regulations of the city of Everett.

“Section 9.—In consideration of the rights herein granted, the city of Everett shall have the right to suspend and maintain on the poles of the grantee, its successors and assigns, all wires which it may require for fire alarm and police telegraph purposes.

“Section 10.—The grantee shall within thirty days from the adoption of this ordinance file with the city clerk its acceptance of this franchise which is granted subject to its conditions.

"Section 11.—The grantee shall furnish all telephones required for the city's use at the rate of two thirds the price charged private individuals, and in no case to exceed the charge of two dollars and sixty-five cents per month for each telephone required for the city's use.

"Section 12.—The right herein granted shall continue to be in force for twenty-five years from and after the passage of this ordinance.

"Section 13.—The failure of the grantee to comply with the provisions herein shall operate as a forfeiture of the rights herein granted."

Within the time limited by the ordinance, the grantee named therein filed with the city clerk its acceptance of the franchise granted, and thereafter, at great expense to itself, installed within the city a telephone and telegraph system, during the course of which it erected a large number of poles on the streets and alleys of the city along which it stretched wires for the transmission of electricity. Subsequent to the installation of the plant, the grantee leased the same to its co-appellant The Pacific Telephone and Telegraph Company, which is now operating the same. The companies have at all times complied with the terms and conditions of the ordinance; their property within the city of Everett has been regularly assessed for state, county, school, and city taxes on an *ad valorem* basis as prescribed by the state constitution, which taxes it has duly and regularly paid.

The city of Everett, while a city of a lesser class at the time of the granting of the franchise mentioned, subsequently so far increased in population as to be entitled to become a city of the first class, with the privilege of framing its own charter. On April 16, 1912, advantage was taken of the privilege, the city framing and adopting a charter in accordance with the authorization found in § 10, art. 11, of the state constitution. Section 148 of the charter so adopted reads as follows:

"A minimum tax of fifty cents per annum shall be levied and collected upon each telegraph, telephone, electric light or

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other pole in or upon any street, alley or other public place of the city of Everett: Provided, that this section shall not apply to metal poles supporting cluster lights.”

On May 4, 1915, acting under and in pursuance of the foregoing provision of the charter, the city council of the city of Everett enacted the following ordinance No. 1654 (formal parts omitted) :

“Section 1. That it shall be the duty of every person, firm or corporation maintaining or using any telegraph, telephone, electric light or other pole in or upon any street, alley or other public place in the city of Everett to pay to the city treasurer of the city of Everett on or before the first day of July, 1915, and on or before the first day of July of each and every year thereafter, a license tax of fifty cents for each pole so maintained or used, and secure a license to so maintain such pole or poles; provided, that this section shall not apply to metal poles supporting cluster lights; and provided, further, that if two or more persons, firms or corporations are using the same pole, the person, firm or corporation owning or leasing such pole shall pay the license tax herein provided for.

“Section 2. That upon the payment of such tax as herein provided, to the city treasurer of the city of Everett, said treasurer shall issue a receipt therefor, and upon the presentation of such receipt to the city clerk of said city, said clerk shall issue to said person, firm or corporation paying such tax a license to maintain the pole or poles for which such license tax is paid, for the year for which such tax is paid.

“Section 3. The city council of the city of Everett shall not issue a permit to erect any pole or poles in or upon any public street, alley or other public place within the city of Everett to any person, firm or corporation who has not paid the license tax as herein provided for.

“Section 4. If any person, firm or corporation fails to pay the license tax herein provided for, the city of Everett may bring suit to recover the same, in the superior court of Snohomish county.

“Section 5. Any person, firm or corporation, who violates any of the provisions of this ordinance, shall, upon conviction, be punished by a fine of not to exceed one hundred (\$100) dollars, or by imprisonment in the city jail for a period of thirty (30) days, or by both such fine and imprisonment, and

each day that any person, firm or corporation shall continue to violate or fail to comply with any of the provisions of this ordinance, shall be deemed and considered a separate offense."

The city thereafter threatened to enforce the provisions of the ordinance, whereupon the present action was begun to enjoin it from so doing. The complaint of the appellants, after appropriate allegations setting forth the foregoing facts, further alleged that there is no statute of the state of Washington, provision of the charter, or ordinance of the city of Everett authorizing or providing for the inspection of poles such as the plaintiff's poles are; that no inspection of such poles has ever been made by the city of Everett, and that the ordinance was not passed with a view of or for the purpose of regulating the plaintiff's business or property, but for revenue purposes only; the charge being one of rental for the use by plaintiffs of the space occupied by the poles in the streets, alleys and other public places of the city of Everett. It was further alleged that the charge of fifty cents per pole was excessive considered as rental for the spaces occupied, and that the charter provision and ordinance violated the clause of the state constitution requiring an equal and uniform rate of assessment and taxation, and the clauses of the state and Federal constitutions which prohibit the passage of a law impairing the obligation of a contract or which deprive a person of his property without due process of law.

A general demurrer to the complaint was interposed, which the trial court sustained. The plaintiffs thereupon elected to abide by the complaint, and appeal from the judgment of dismissal which followed.

Before passing to the specific contentions of the parties, there are certain general principles suggested by the record which it may be well to recall to mind. It is settled law that a municipality has power to exercise local governmental supervision over the business of a public corporation in so far as such business is carried on within its corporate boundaries, and may charge the reasonable cost thereof to the corpora-



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tion. This it may do under its police powers, in the interest of the public health, safety, or convenience, notwithstanding it may have granted the corporation a franchise to conduct such business therein. There are, of course, limitations upon the exercise of the power arising from the conditions of the particular case, but the power itself is undoubted and may be exercised whenever a reasonable necessity exists therefor. *Dillon, Municipal Corporations* (5th ed.), p. 2074; *Atlantic & P. Tel. Co. v. Philadelphia*, 190 U. S. 160; *Western Union Tel. Co. v. New Hope*, 187 U. S. 419; *Postal Tel. Cable Co. v. Taylor*, 192 U. S. 64; *People v. Squire*, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. 893; *Philadelphia v. Postal Tel. Cable Co.*, 66 Hun 633, 21 N. Y. Supp. 556; *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 137 Pac. 861, Ann. Cas. 1913D 78, L. R. A. 1915C 287.

In this state it is well settled law, also, that license taxes may be levied upon businesses and occupations, notwithstanding the property employed therein may have been assessed for taxation in accordance with its value under the general taxing laws of the state; this, on the principle that such taxes are not taxes upon property but are taxes upon privileges. *Fleetwood v. Read*, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205; *Stull v. DeMattos*, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; *State v. Ide*, 35 Wash. 576, 77 Pac. 961, 102 Am. St. 914, 67 L. R. A. 280; *In re Garfinkle*, 37 Wash. 650, 80 Pac. 188; *Oilure Mfg. Co. v. Pidduck-Ross Co.*, 38 Wash. 137, 80 Pac. 276; *McKnight v. Hodge*, 55 Wash. 289, 104 Pac. 504, 40 L. R. A. (N. S.) 1207; *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; *Seattle v. King*, 74 Wash. 277, 133 Pac. 442.

It is another general rule that the grant of a franchise is in the nature of a contract, protected by the Federal constitution as such, and cannot be altered or amended during its life by the grantor to the detriment of the grantee by adding new conditions or burdens thereto. *Commercial Elec. Light*

& Power Co. v. Tacoma, 17 Wash. 661, 50 Pac. 592; *Peterson v. Tacoma R. & Power Co.*, 60 Wash. 406, 111 Pac. 338, 140 Am. St. 936; *Tacoma v. Boutelle*, 61 Wash. 434, 112 Pac. 661; *Minneapolis v. Minneapolis St. R. Co.*, 215 U. S. 417; *Hot Springs Elec. Light Co. v. Hot Springs*, 70 Ark. 300, 67 S. W. 761; *Texarkana Gas & Elec. Co. v. Texarkana*, 58 Tex. Civ. App. 109, 123 S. W. 213; *New Orleans v. Great Southern Tel. & Tel. Co.*, 40 La. Ann. 41, 3 South. 533, 8 Am. St. 502.

Inquiring into the nature of the charge here sought to be imposed, it seems clear that it is not a tax for the purpose of regulation. Neither the charter provision nor the ordinance provides for regulation, supervision, or police surveillance of the company's property in any form whatsoever. We know judicially that there is no general law requiring such supervision, and it is alleged in the complaint, and for the purposes of this action we must accept the allegation as true, that there is no ordinance of the city of Everett requiring such supervision. We have, therefore, nothing more than a charter provision declaring that a charge of a minimum amount shall be collected, and an ordinance providing for its collection. Such a charge cannot be sustained as a police regulation. License taxes or charges for this purpose do not differ from other forms of taxation in the respect that there must be a purpose to which they can be lawfully applied. They cannot be collected in anticipation of need. They must be reasonably commensurate with the expense of regulation, and this expense cannot be known even approximately until the nature of the regulation is ascertained and defined. In other words, they must be imposed in pursuance of some general or special statute or ordinance prescribing the purposes to which they are to be applied. In the language of the supreme court of the United States in *Postal Tel. Cable Co. v. Taylor*, *supra*:

"To uphold it [the ordinance] in such a case as this is to say that it may be passed for one purpose and used for an-

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other; passed as a police inspection measure and used for the purpose of raising revenue; . . . It is thus to be declared legal upon a basis and for a reason that do not exist in fact."

It is equally clear that it is not a tax upon occupations or businesses. In the first place it does not purport to be such a tax. In the second place the amount charged is not graduated by the amount of the business, nor is a sum fixed for the privilege of doing business. This is made more apparent when it is remembered that the charge could be avoided entirely by the simple process of moving the poles against which the charge is aimed from the streets and other public places of the city to private property, while the business of the owners could be continued as before. *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92; *Western Union Tel. Co. v. New Hope*, 187 U. S. 419.

What then is the nature of the charge? This question is answered in the case of *St. Louis v. Western Union Tel. Co.*, above cited. It was there said:

"And, first, with reference to the ruling that this charge was a privilege or license tax. To determine this question, we must refer to the language of the ordinance itself, and by that we find that the charge is imposed for the privilege of using the streets, alleys and public places, and is graduated by the amount of such use. Clearly, this is no privilege or license tax. The amount to be paid is not graduated by the amount of the business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city—that which may properly be called rental. 'A tax is a demand of sovereignty; a toll is a demand of proprietorship.' *State Freight Tax Case*, 15 Wall. 232, 278. If, instead of occupying the streets and public places with its telegraph poles, the company should do what it may rightfully do, purchase ground in the various blocks from private individuals, and to such ground remove its poles, the section would no longer have any application to it. That by it the city receives something which it may use as revenue, does not determine the

character of the charge or make it a tax. The revenues of a municipality may come from rentals as legitimately and as properly as from taxes. Supposing the city of St. Louis should find its city hall too small for its purposes, or too far removed from the centre of business, and should purchase or build another more satisfactory in this respect; it would not thereafter be forced to let the old remain vacant or to immediately sell it, but might derive revenue by renting its various rooms. Would an ordinance fixing the price at which those rooms could be occupied be in any sense one imposing a tax? Nor is the character of the charge changed by reason of the fact that it is not imposed upon such telegraph companies as by ordinance are taxed on their gross income for city purposes. In the illustration just made in respect to a city hall, suppose that the city, in its ordinance fixing a price for the use of rooms, should permit persons who pay a certain amount of taxes to occupy a portion of the building free of rent, that would not make the charge upon others for their use of rooms a tax. Whatever the reasons may have been for exempting certain classes of companies from this charge, such exemption does not change the character of the charge, or make that a tax which would otherwise be a matter of rental. Whether the city has power to collect rental for use of streets and public places, or whether, if it has, the charge as here made is excessive, are questions entirely distinct. That this is not a tax upon the property of the corporation, or upon its business, or for the privilege of doing business, is thus disclosed by the very terms of the section. The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. It is seeking to collect rent."

Such a charge, however, is not necessarily void. A municipality can, as a condition precedent to the use of its property, exact of the user such terms and conditions as it may deem necessary to impose, whether the property the use of which is granted be held by it in its governmental or private capacity. Any person or corporation accepting the privileges granted must be held to have accepted them upon the conditions imposed, and if a part of these conditions be that the

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acceptor of the privilege pay a fixed charge per pole for all poles it may erect in the public places of the city, the charge can be lawfully collected.

But it does not follow that the city may grant a franchise to a corporation to use its streets and other public places upon terms mutually agreed upon, and then afterwards during the life of the franchise annex additional burdens thereto without the consent of the grantee inconsistent with the rights granted. While it may not surrender the right of regulation necessary to the public health and safety, or the general taxing power (Const., art. 7, § 4), it can make a valid and binding contract concerning the terms upon which the grantee may make use of public places; such a contract as cannot be changed or altered at the will of the city without the consent of the other party thereto.

Turning to the ordinance granting the franchise to the appellant corporation, it will be seen that the grant is made upon enumerated terms and conditions. The right to exact a charge upon the poles of the grantee as a condition precedent to their maintenance is not one of such conditions. It is therefore an additional burden which the city seeks to impose upon the right to use its streets which it has contracted may be used without such burden. This we hold the city may not do.

In *New Orleans v. Great Southern Tel. & Tel. Co.*, *supra*, the precise question was presented. The court, after showing that the charge imposed was not a tax either for regulation or revenue, proceeded as follows:

“The only remaining question is, whether, after granting the defendant the authority to construct and to maintain its lines without limitation as to time, and with no other consideration than the furnishing of certain free telephonic facilities to the city; after the defendant has, at great expense, established its plant, and constructed its lines, and when it has fully complied with all the conditions imposed, the city can now exact this large additional consideration for the continued enjoyment of privileges already granted.

"If the city can do this now, she could have done it the very day after the defendant had completed its lines, when it had incurred all the expense and before it had reaped a particle of return. If she can impose a charge of \$5 per pole, she can, with equal power, impose one of \$1,000, and for that matter, she could arbitrarily revoke the grant at her pleasure. Either she is bound according to the terms of her proposition accepted and acted on by defendant or she is not bound at all. Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside or to interpolate new and more onerous considerations therein. Such has been the well recognized doctrine of the authorities since the *Dartmouth College* case, 4 Wheat. 518."

The case of *Hot Springs Elec. Light Co. v. Hot Springs, supra*, is also in point. The facts of the case and conclusion of the court are stated in the following language:

"This is an action by the city of Hot Springs against the Hot Springs Electric Light Company to recover a sum of money which the city claims of it for the use and occupation of certain portions of the public streets upon which the company has erected its poles for electric light purposes. An ordinance of the city requires that each person, company or corporation erecting and maintaining any pole in the streets of the city for electric light, telephone, or certain other purposes shall pay to the city 50 cents per annum for each pole so erected and maintained. We can agree with counsel for the city that it had the right to pass an ordinance of this kind requiring persons and corporations erecting poles in the streets for purposes mentioned in the ordinance to pay for that privilege, but it does not follow that the city can in that way affect rights already vested under valid contracts. Now, the ordinance imposing the charge of 50 cents a pole was passed in 1896, but the poles of the defendant company were all erected prior to that date under an ordinance of 1887, giving the company the right to maintain an electric light plant and to erect poles along the streets and avenues, and to string wires thereon, for the purpose of lighting the city, for and during a period of twenty years. This grant by the

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city council, having been accepted and acted upon by the Electric Light Company, became, in effect, a contract between the city and the company, which cannot be abrogated without the consent of the company. Under this grant of the right to use the streets of the city for the erection of its poles, the company not only invested large sums of money in the erection of plant, poles and wires, but, relying on that ordinance, it has, for an agreed consideration, contracted with the city council to light the streets of the city for a period of ten years by furnishing lights at points in the city designated by the city council, and has agreed that upon a failure to furnish such lights it will forfeit and pay to the city \$5 per day for each light it fails to furnish. All this was done before the passage of the ordinance imposing on the company a charge of 50 cents per year for each pole placed in the street.

“Now, a grant which has been accepted and acted upon by the grantee is a contract, within the meaning of the constitution of the United States, which forbids laws impairing the obligation of contracts. When, therefore, rights and franchises lawfully granted to either a person or corporation have been duly accepted, and valuable improvements have been made on the faith of such grant, it becomes, in effect, a contract, which cannot be impaired either by a law of the state or by an ordinance of a municipality. The rights and franchises granted can then neither be revoked, nor can they be diminished in value by the imposition of additional burdens upon their use and enjoyment. *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *New Orleans Gas Company v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *Sioux City St. Ry. Co. v. Sioux City*, 138 U. S. 98; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92; *Burlington v. Burlington St. Ry. Co.*, 49 Iowa 144; 2 Beach, Contracts, § 1205; 3 Parsons on Contracts (8th Ed.), page 479; 15 Am. & Eng. Enc. Law (2d Ed.), 1049.”

See, also, *Texarkana Gas & Elec. Co. v. Texarkana*, *supra*; *Sunset Tel. & Tel. Co. v. City of Medford*, 115 Fed. 202; *Boise Artesian Hot & Cold Water Co. v. Boise City*, 230 U. S. 84.

Our conclusion is that the charter and ordinance is invalid as creating a charge upon the appellants' poles, and that the court erred in sustaining the demurrer to the complaint.

The judgment is reversed, and the cause remanded with instructions to overrule the demurrer.

ELLIS, C. J., PARKER, MORRIS, MOUNT, MAIN, CHADWICK, and HOLCOMB, JJ., concur.

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[No. 13712. Department Two. July 17, 1917.]

S. W. BARKER, *Appellant*, v. SCANDINAVIAN-AMERICAN BANK,  
*Respondent*.<sup>1</sup>

FRAUD—MISREPRESENTING FINANCIAL STANDING — EVIDENCE—SUFFICIENCY. Damages for fraudulently misrepresenting the financial standing of a concern, which a bank officer, upon inquiry, assured the plaintiff was in good condition and would unquestionably take care of a credit about to be extended, cannot be recovered where it does not appear that the statements were made recklessly without knowledge of the truth, or as a positive statement, and the officer informed the plaintiff that the party was indebted to the bank and declined to take the note without recourse; especially where plaintiff was not satisfied and did not rely on the statements, but prosecuted further inquiry from another bank.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered April 14, 1915, upon granting a nonsuit, in an action for false representations, after a trial on the merits. Affirmed.

*F. D. Oakley and Martin Rozema*, for appellant.

*Williamson, Williamson & Freeman*, for respondent.

MOUNT, J.—This appeal is from a judgment of nonsuit, entered upon the defendant's motion at the close of the plaintiff's evidence. The action was brought for the recovery of damages alleged to have been sustained by reason of false representations made by the defendant to the plaintiff in

<sup>1</sup>Reported in 166 Pac. 618.



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reference to the financial condition of the Nelson-Johanson Mill Company, on July 7, 1910.

The facts, as shown by the evidence on behalf of the plaintiff, are substantially as follows: In the month of April, 1910, the appellant was engaged in logging operations, and the Nelson-Johanson Mill Company, a corporation, was operating a saw mill near Tacoma. In April of that year, the appellant received an order for some logs from the Nelson-Johanson Mill Company. On receiving this order, he visited the Scandinavian-American Bank, and had a conversation with Mr. E. C. Johnson, who was the cashier of that bank at that time. The appellant testified to that conversation as follows:

"I told Mr. Johnson (Cashier of Scandinavian-American Bank) I had been requested by the Nelson-Johanson Mill Company, or Mr. Nelson, to ascertain the financial condition of the Nelson-Johanson Mill Company. I told Mr. Johnson I would like to know what it was; Mr. Nelson had asked me to come there. Mr. Johnson said they were in splendid financial condition at the present time; some time previous to that they had been in close quarters, but he said that they had just put in \$50,000 of fresh capital or new capital. I remember distinctly that he added to that, he says, 'I know that they have done it because they put it through our bank.' I asked Mr. Johnson if he would take the note without recourse and he says: 'Now, Mr. Barker, I have conferred with my associates, and we will take that note without recourse, provided you deposit the money here, open an account and do business with us.' "

After that conversation, the appellant sold a raft of logs to the mill company on April 5th of that year. He sold another raft on April 26th, another about the middle of May, and another about the last of May, 1910. For all of these sales, he received his pay. About the 5th or 6th of July, 1910, he received another order from the mill company, and again went to the bank to inquire into the financial condition of the mill company. He testified to that conversation as follows:

"I went to the (Scandinavian-American) bank to see Mr. Johnson, and I told him that I was there again about the Nelson-Johanson credit. Mr. Johnson had referred me,—he said, 'Just a minute; Mr. Pringle is here and I will introduce you to him. Step right around the corner.' I stepped around the corner and Mr. Johnson went to the door. He opened it and Mr. Pringle came out and Mr. Johnson introduced us. I said to Mr. Pringle, 'Mr. Pringle, I am here at the request of the Nelson-Johanson Mill Company; they want the logs and I will not extend credit unless I know the note will be taken care of.' He pulled his watch out of his pocket and he says, 'I am in a great hurry, I will have to catch a car in five or ten minutes,' he says. I says, 'This is a very important matter to me; they want the logs and I would like to sell them and I have come over to see about it. I won't sell—' He says, 'There is no question about their financial standing now.' He says, 'You are running no risk.' I says to him, 'Will you take the note without recourse?' And he says, 'No, I do not want to do that.' He says, 'This is a good time to get business; we don't want to put all of our eggs in one basket. We are now carrying them for their lumber shipment, which is a large amount, and we don't feel like putting any more money into the business. They are in good condition. Mr. Johanson is now managing the company, and there is no question about their taking care of it.' "

Appellant then testified:

"I had further inquiries made in reference to the financial condition of the mill. I immediately telephoned to Mr. C. S. Harley, cashier of the Mercantile Bank at Seattle and told him of my conversation with Mr. Pringle. I wanted it verified. I says, 'This is a very important thing to me; I cannot extend credit unless I am verified, and I want you to telephone. I will stay right here.'

"I heard from him (Mr. Harley) in about an hour or two in reference to this inquiry, as to the financial condition of the mill. Then I let them have the logs.

"After receiving the telephone communication from the Mercantile National Bank of Seattle, Mr. Harley, in reference to this matter I let the Nelson-Johanson Lumber Company have the raft of logs."

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In payment of the raft of logs, the appellant took a promissory note for \$3,878.31 from the Nelson-Johanson Mill Company. This note was dated July 14, 1910. It was never paid. On the 12th of August, following, the mill company went into insolvency, and was adjudged a bankrupt on the 29th day of August, 1910. On July 7, 1910, the mill company was indebted to one Gawley in the sum of \$40,000 on promissory notes secured by a mortgage upon the mill property. At that time, the respondent bank held a mortgage of \$100,000 upon the entire mill plant, and the Nelson-Johanson Mill Company, in addition to these amounts, owed the bank \$68,000 of unsecured notes. On May 31, 1910, the mill company had furnished a statement of its resources and liabilities to the respondent bank, showing the total resources to amount to \$388,000, in round numbers, and the liabilities, \$272,000, leaving an excess of resources over liabilities amounting to \$115,000. At the time of the bankruptcy, the liabilities of the mill company amounted to \$323,000. Of that amount, it owed the bank \$232,000. All of the property of the mill company was consumed in paying the obligations secured by the mortgages, so there was nothing left to the unsecured creditors.

Upon this state of facts, the trial court was of the opinion that there was no liability of the bank to the appellant in this case. In *Raser v. Moomaw*, 78 Wash. 653, 139 Pac. 622, 51 L. R. A. (N. S.), 707, we stated the rule, with reference to cases of this character, as follows:

“The essential elements necessary to constitute actionable fraud and deceit are, in the main, well settled. These elements are correctly set forth in 20 Cyc. 13. It is there said that ‘it must appear: (1) that the defendant made a material representation; (2) that it was false; (3) that when he made it he knew it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) that he made it with the intention that it should be acted upon by the plaintiff; (5) that the plaintiff acted in reliance upon it; and (6) that he thereby suffered an injury.’ ”

See, also, to the same effect: *Simons v. Cissna*, 52 Wash. 115, 100 Pac. 200, and *Northwestern S. S. Co. v. Dexter-Horton & Co.*, 29 Wash. 565, 70 Pac. 59.

We think the evidence fails to show that Mr. Pringle, the vice-president of the Scandinavian-American Bank, knew the representations were false which were testified to by the appellant, or that such representations were made recklessly, without knowledge of the truth, or as a positive assertion. If the representations were made by Mr. Pringle with the intention that they should be acted upon by the appellant, it is plain that the appellant did not act in reliance upon such representations. It plainly appears from the evidence of the appellant himself that, prior to the 7th day of July, he had sold the mill company four rafts of logs. These rafts had been promptly paid for. Between the 30th of May and the 5th or 6th of July, the appellant evidently became apprehensive of the financial condition of the mill company with which he had been doing business, and he was referred again to the respondent bank to ascertain the company's financial condition. The bank, at that time, was a large creditor of the mill company. Mr. Pringle so stated to the appellant. The mill company owed the bank some \$168,000. The mill company had furnished to the bank a statement showing its financial condition. This statement showed resources over \$300,000, and liabilities over \$200,000, so that the net resources over the liabilities was some \$115,000. There is no showing in this record that the officers of the bank had any other knowledge of the financial condition of the company than was shown by this statement; and, as evidence of the fact that the bank relied upon this statement upon the very day the appellant inquired of the vice-president of the bank about the financial condition of the mill company, the bank loaned to the mill company an additional \$10,000 upon its unsecured note, and subsequent to that time, the bank loaned an additional \$25,000 upon the unsecured note of the mill company; indicating very clearly that, so far as the officers

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of the bank were concerned, they believed at that time the mill company was in good financial condition. At most, we think the representations made to the appellant by Mr. Pringle, the vice-president of the bank, were expressions of opinion. In the case of *Simons v. Cissna, supra*, it appeared that Mr. Cissna was familiar with the affairs of the mill and timber company "down to the smallest detail." There is no evidence in this case that Mr. Pringle, or the bank of which he was vice-president, was acquainted with the condition of the Nelson-Johanson Mill Company, further than its financial statement, above referred to, shows. We are satisfied, therefore, that there was no showing that the representations made by Mr. Pringle were made falsely or recklessly, or with intent to deceive the appellant, or that he should act upon them independently, and, as shown by the appellant's own testimony, he did not act upon the representations made to him by Mr. Pringle. He testified that he was not satisfied with the statements of Mr. Pringle, and that he therefore telephoned to his banker in Seattle for information; and that, after his banker in Seattle had given him the information he desired, he then sold the raft of logs to the mill company and took its note therefor.

So it is apparent, from the record in this case, that the appellant did not rely upon the representations made by Mr. Pringle.

We are satisfied, for these reasons, that the trial court properly granted a nonsuit.

The judgment is therefore affirmed.

HOLCOMB, PARKER, and MAIN, JJ., concur.

ELLIS, C. J., took no part.

[No. 14030. Department Two. July 17, 1917.]

JOHN T. GRAY, *Respondent*, v. KATE L. HICKEY, *as Executrix etc., Appellant*.<sup>1</sup>

**JUDGMENT—PARTIES CONCLUDED.** A decision on appeal in a former action between the same parties as to the sufficiency of a claim filed against an estate is conclusive in a subsequent action.

**ELECTION OF REMEDIES—DISTINCT REMEDIES—LIENS AND BREACH OF CONTRACT.** Since there can be no lien upon wood for loss of profits through breach of a contract for cutting, an action to foreclose a lien for the cutting of wood is not an election of remedies barring a subsequent action to recover damages for loss of profits through breach of the contract.

**APPEAL—REVIEW—VERDICTS.** A verdict upon questions of fact submitted to the jury is conclusive on appeal.

**APPEAL—REVIEW—WAIVER OF ERROR.** Error in denying motions for nonsuit and for a bill of particulars, are waived, where the appellant went to trial and was not prejudiced in presenting the different defenses relied upon.

**CONTRACTS—BREACH—ACTIONS—INSTRUCTIONS.** In an action for breach of contract, an instruction authorizing verdict for the plaintiff if the defendant paid "for the number of monthly installments, and refused to pay one or more thereafter," is not susceptible of the construction that it authorizes the jury to find for plaintiff if defendant did not pay money on the day it became due.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered June 16, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

*Guy E. Kelly and Thomas MacMahon*, for appellant.

*Wm. H. Pratt and Chas. Bedford*, for respondent.

MOUNT, J.—This action was brought to recover damages for an alleged breach of a written contract. The cause was tried to the court and a jury, and resulted in a verdict and judgment in favor of the plaintiff for \$575. The defendant has appealed.

<sup>1</sup>Reported in 166 Pac. 625.

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It appears that, in March, 1915, M. J. Hickey entered into a written contract with respondent whereby respondent agreed to cut a certain number of cords of wood at a given price. He was to be paid on the 5th of each month for the wood cut during the preceding month. Soon after entering into this contract, Mr. Hickey died. The respondent continued the work under the direction of the executrix of the estate of Mr. Hickey. The work was paid for up to July. Thereafter, the executrix of the estate of Mr. Hickey refused to pay for wood cut during the months of July, August, and September, or thereafter, and the respondent thereupon filed a lien for the wood which had been cut under the contract. Afterwards, he brought a suit to foreclose the lien, and judgment was rendered in his favor. An appeal was prosecuted to this court, and the judgment of the lower court was affirmed as to the right of the respondent to a lien for the work he had done, but was modified in respect to other lien claimants. *Gray v. Hickey*, 94 Wash. 370, 162 Pac. 564.

Thereafter, this action was brought to recover damages for an alleged breach of the contract, and resulted in a judgment as above stated. Mrs. Hickey, as executrix of the estate, has appealed.

It is argued, first, that the complaint does not state a cause of action for the reason that the complaint does not allege a rejection of the claim filed with the executrix. The sufficiency of this claim, or one of the same nature, was presented upon the appeal in the other case, and we there held that the claim filed with the executrix of the estate was sufficient, without a formal rejection. It is unnecessary to further consider this question.

It is next claimed that the action is barred because of a previous election of an inconsistent remedy, and it is argued that, because the respondent brought an action to foreclose his lien for work done under the contract, he cannot now maintain this action for damages on account of the breach of the contract. There can be no doubt that, where a contract is

breached, the party injured may pursue one of two remedies: First, he may sue upon his contract and recover his loss of profits; or, second, he may waive the contract and sue upon a *quantum meruit*; but he cannot pursue both remedies, for they bear a different measure of damages. *Gabrielson v. Hague Box & Lumber Co.*, 55 Wash. 342, 104 Pac. 635, 133 Am. St. 1032. This is, no doubt, the general rule.

When the other action was brought by the respondent to foreclose his claimed lien, that action was based upon the contract for work which had been done. No claim was made in that case for damages occasioned by loss of profits for a breach of the contract. We are of the opinion that a lien may not be claimed for loss of profits. The appellant cites and relies upon the case of *Gould v. McCormick*, 75 Wash. 61, 134 Pac. 676, Ann. Cas. 1915A 710, 47 L. R. A. (N. S.) 765. That was a case where an architect had been employed to draw plans and superintend the construction of a building. Before the building was completed, he was discharged. He filed a claim of lien for services as architect and superintendent of the building, and was allowed to maintain his claim upon the contract, but the question of the right of a lien claim for profits or damages resulting from breach of the contract was neither considered nor alluded to in that case, and we did not intend to hold that a lien may be claimed for damages for the breach of a contract. We are satisfied that, under the statute, no such lien can exist. We are of the opinion, therefore, that the foreclosure of the lien in the former case was not an adjudication of the rights of the respondent in this case, and that there was no selection of remedies when the respondent brought his action to foreclose the lien which he claimed for work done, because the right to profits was not, and could not be, litigated in that case.

It is next argued by the appellant that the evidence shows that the appellant did not breach the contract, but that the respondent himself breached it. These are questions of fact



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which were submitted to the jury and were resolved in favor of the respondent and are conclusive now. It is unnecessary, therefore, to discuss the evidence upon these questions.

It is next argued that the court erred in denying the appellant's motion for a nonsuit and in denying a motion for a bill of particulars. After these motions were overruled, the appellant filed an answer and went to trial. It does not appear that the appellant was prejudiced in presenting the different defenses which she relied upon to defeat the action. These errors, if they were errors, were therefore waived. *Parker v. Washington Tug & Barge Co.*, 85 Wash. 575, 148 Pac. 896; *Ryan v. Lambert*, 49 Wash. 649, 96 Pac. 232; *Henry v. Navy Yard Route*, 94 Wash. 526, 162 Pac. 584.

The court, among other instructions, gave the jury the following:

"You are instructed in this cause that, if you find that the contract alleged in the complaint was entered into between the parties, and that if the plaintiff had performed, and the defendant had received the materials, and paid for a number of monthly installments, and a refusal to pay one or more thereafter, especially if coupled with a notice that defendant would not pay for the same, and a refusal to measure up and receive the wood, that such action on the part of the defendant constituted a breach of defendant's part of this contract and the plaintiff was entitled to sue for and obtain full payment for all the work performed and not paid for, and reasonable damages in the shape of loss of profits for the balance of the contract. Providing he himself had not theretofore breached the contract. . . ."

The appellant criticises this instruction by saying that it is confusing and not clear, and authorized the jury to return a verdict against appellant if they found that she did not pay the money on the day it became due. The instruction, it seems to us, is quite clear, and is not susceptible of the construction that the appellant was required to pay on the day the payments became due, for it says "for a number of

monthly installments, and a refusal to pay one or more thereafter, especially if coupled with a notice that defendant would not pay for the same, and a refusal to measure up and receive the wood."

We think the jury could not have been misled by this instruction, for the contention of the respondent upon the trial was that there was an absolute refusal of the appellant to comply with the contract or to pay for the wood cut after July, 1915.

We have examined the record quite carefully in this case and fail to find any error therein. The errors alleged which we have not noticed are without merit.

The judgment is therefore affirmed.

ELLIS, C. J., FULLERTON, HOLCOMB, and PARKER, JJ., concur.

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[No. 13894. *En Banc*. July 17, 1917.]

N. H. ST. GERMAIN *et al.*, Appellants, v. BAKERY &  
CONFECTIONERY WORKERS' UNION No. 9 of  
SEATTLE *et al.*, Respondents.<sup>1</sup>

INJUNCTION—TRADE UNIONS—PICKETING—RIGHT TO PICKET. Where plaintiffs' restaurant was picketed by labor unions, the pickets wearing cards which declared the place unfair to union labor, and the business and prospective purchasers were interfered with, and the only object of the picketing was to intimidate, not only the public, but the plaintiffs and force them to enter into a contract, the same will be enjoined as an unlawful interference with plaintiffs' business, regardless of whether it was peaceful or otherwise.

DAMAGES—FROM PICKETING—LOSS OF PROFITS—EVIDENCE—SUFFICIENCY. Upon enjoining the picketing of plaintiffs' restaurant, substantial damages cannot be awarded merely on a showing that there was a large falling off of their business, where there was nothing to show what the profits were; and it is not enough to show that the average gross receipts had been \$4,000 monthly and that they fell off to \$1,000 monthly.

<sup>1</sup>Reported in 166 Pac. 665.

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TRADE UNIONS — ACTIONS — PARTIES — JUDGMENT. In an action against unions and their officers for "picketing" plaintiffs' place of business, in which the complaint alleges that the unions were voluntary organizations with a membership of over five hundred, and that it was impracticable to bring in all the members, judgment for plaintiffs should award injunction, damages, and costs against the unions as organizations as well as against all other persons acting by, through, or for them.

HOLCOMB, J., dissents.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 30, 1916, favorable to the defendants, in an action for an injunction, after a trial on the merits before the court. Reversed.

*Halverstadt & Clarke* and *Piles & Halverstadt*, for appellants.

*Thomas Byron MacMahon* and *Preston & Thorgrimson*, for respondents.

MOUNT, J.—This action was brought to enjoin the defendants from picketing in front of the plaintiffs' places of business in the city of Seattle, and from annoying and harassing the plaintiffs' customers as they were entering or leaving the plaintiffs' places of business, and for damages.

The case was tried to the court. No findings of fact were made, but the court, at the conclusion of the trial, entered a decree as follows:

"It is Ordered, Adjudged and Decreed, That Percy Wood, William T. McGuerin, T. H. Bolton, and Guida Axtheim, individually and as associates under the name and style of Bakery & Confectionery Workers' International Union No. 9 of Seattle, Washington, and all persons associated with said individuals as said Bakery & Confectionery Workers' International Union No. — of Seattle, Washington, and Harry Mitchell, Frank Guilke, and William H. Fraser, individually, and associated together under the name and style of Cooks' and Assistants' Union, Local No. 33, and all persons associated with them under such name, and Edward Schutt, and their and each of their agents, and employees,

be and they hereby are, enjoined and restrained from congregating in front of plaintiffs' place of business at No. 409, Pike Street and No. 1515-1517, Pike Place, each, in the city of Seattle, King county, Washington, from talking to any one while in front of either of plaintiffs' said places of business in any way reflecting on plaintiffs' business or on the manner of conducting the same, from saying anything while in front of either of plaintiffs' said places of business concerning plaintiffs' employing members of the Japanese race or Chinamen, from stating that plaintiffs' business is conducted in a dirty manner, from the use of the word 'scab' or 'scabs' while in front of plaintiffs' places of business, from laying hands upon or touching any one while in front of either of plaintiffs' said places of business with intent to in any way cause such person not to trade with, or enter the said stores of plaintiffs. But such injunction shall not run against said Unions as entities.

"It is Further Ordered, Adjudged and Decreed, That said defendants may, if they desire, place and maintain two pickets in front of each of plaintiffs' said places of business, and that said pickets may wear a badge or scarf having on the same the words, 'St. Germain's Bakeries and Restaurants Unfair to Organized Labor,' or words to that effect, but nothing more. That said pickets at plaintiffs' store No. 409, Pike Street shall walk on the outer curb of the sidewalk, and at plaintiffs' place of business at No. 1515-1517 Pike Place shall walk in the center of the sidewalk, and if the crowds in front of plaintiffs' said places of business are such at any time that said pickets cannot walk in the middle of the sidewalk, they shall cease picketing until conditions are such that they can walk in the middle of the sidewalk.

"It is Further Ordered, Adjudged and Decreed, That said defendants may use cards such as Plaintiffs' Exhibit 'A' introduced in evidence in this cause, but they are perpetually enjoined and restrained from throwing or leaving any of them in plaintiffs' said places of business.

"It is Further Ordered, Adjudged and Decreed, That plaintiffs do have and recover their costs and disbursements herein to be taxed of and from Percy Wood, William T. McGuerin, and Guida Axtheim, individually, and of each of them, and of Harry Mitchell, Frank Guilke and William H. Fraser, individually, and of each of them, and of Edward Schutt."

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The cards referred to in this decree were cards about three inches square, and contained the words, "St. Germain Bakeries, Public Market and 409 Pike St., Unfair to Organized Labor." The plaintiffs have appealed from all that part of the decree beginning with, and following, the words, in the first paragraph, "But such injunction shall not run against said Unions as entities."

There is no material dispute in the facts, which are, in substance, as follows:

The respondent unions are voluntary associations of bakers and cooks, respectively. The respondents Wood and McGuerin are president and business agent, respectively, of the respondent bakers' union, and members of it. Respondents Bolton and Axtheim are members of that union. The respondents Mitchell, Guilke and Fraser are president, business agent, and secretary, respectively, of the cooks' union. The respondent Schutt does not belong to either union, but was paid for his participation in picketing the appellants' places of business. The appellants have been engaged in the bakery and dairy-lunch business in Seattle for about sixteen years. They had two stores in the city of Seattle, one at No. 409 Pike Street, and the other in the Pike Place market. The store in the Pike Place market fronts on one of the most crowded streets in the city of Seattle. The appellants, prior to April 29, 1916, employed only union bakers. They were then employing a cook by the name of Paulsen, who was a member of the cooks' union, but was delinquent in his dues. In the early part of April, 1916, Mr. McGuerin and Mr. Guilke, representing their respective unions, called upon the appellants and demanded that they employ only union men, and stated that, if the appellants did not discharge Mr. Paulsen, the union bakers in their stores would be called out. The appellants refused to comply with this request, the union bakers and cooks left the employment of the appellants, and thereupon pickets were stationed in front of both stores of the appellants. These pickets wore white coats, with the

words, "St. Germain's Bakery Employs Non-Union Labor," on the front, and, on the back of these coats appeared the words, in black letters, "Low Wages, Long Hours, Seven Days Per Week."

These pickets went on duty about 11:30 o'clock in the morning, and continued until the stores were closed in the evening. At the beginning, the pickets marched back and forth directly in front of the doors of the places of business of the appellants. There was evidence to the effect that they jostled customers entering and leaving the stores. Upon Saturday, May the 6th, pickets to the number of forty or fifty congregated in front of the Pike Place store, and, while the street was badly crowded, packed the recesses in which the doors were set, and prevented customers from entering the store. Upon several occasions, cards about three inches square, with the words, "St. Germain Bakeries Unfair to Organized Labor," were scattered upon the street and in the store. Prospective purchasers, desiring to enter the store, were called "scabs." Prospective purchasers, entering and leaving the store, jostled certain of the picketers. Policemen were called upon two different occasions to prevent trouble. One arrest was made, but the person arrested was not prosecuted.

It is insisted by counsel for the respondents that, upon the trial of the case, the rightfulness, wrongfulness, or unlawfulness of the strike was not entered into, and it is also insisted that the case was tried upon the assumption that the respondents were justified in calling the strike, and that the only question presented to the lower court, and the only one which should be presented here is whether the acts of the respondents, following the strike, and while they were in such combination, were such as to entitle the appellants to equitable relief.

We shall assume, for the purpose of this case, that the respondents were justified in calling the strike. The reason for the strike is material only as tending to show the animus

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of the respondents in picketing the places of business of the appellants.

The question, then, for decision is, as stated by counsel for the respondents: Were the acts of the respondents, in picketing the places of business of the appellants, justified in law, and are the appellants remediless to restrain picketing by the respondents in the manner provided for by the part of the decree appealed from, or for any purpose?

The decisions upon this question are not altogether in harmony. The rule is generally stated, 24 Cyc., page 834, as follows:

"While it has been held that the mere stationing persons near the premises of another for the mere purpose of observing and obtaining information, for the purpose of conveying information to persons seeking or willing to receive the same, or for the purpose of using orderly and peaceful persuasion with those willing to listen, does not in itself constitute intimidation if done in a peaceful manner, the rule has been repeatedly laid down that the keeping of patrols in front of or about the premises of the employer, accompanied by violence or any manner of coercion to prevent others from entering into or remaining in his service, will be enjoined. . . .

"The doctrine that there may be a moral intimidation which is illegal announced by the supreme court of Massachusetts was among the first judicial steps taken in this country toward overturning the rule permitting peaceable picketing laid down in the first clause of this paragraph, and was a forerunner of the later rule that there can be no such thing as peaceful picketing, and consequently that all picketing is illegal. Picketing will be enjoined as a continuing injury to business notwithstanding it may be punishable as a crime, and the right to injunction against it has been based upon the ground that the aggrieved person is entitled to protection of his 'probable expectancy' which is defined as the right to enjoy a free and natural condition of the labor market. . . .

"It has been repeatedly held that boycotts, in the sense of organized attempts to coerce a person or party into compliance with some demand, by combining to abstain, or compel others (against their will) to abstain, from having any busi-

ness relations with him, are unlawful and will be enjoined; to justify the granting of an injunction, it is not necessary that actual violence shall have been used by defendants; it is sufficient that the means used are threatening and intended to overcome the will of others, and prevent customers from dealing with and laborers from working for the complainant. Intimidation, coercion, or threats of injury to person or property are, however, necessary to justify an injunction against a boycott. And it is necessary that the complainant shall have some established business which may be injured in order to enable him to maintain the bill."

This seems to sum up, generally, the condition of the law upon the subject of picketing, and the rule there stated is supported by numerous authorities cited in the foot notes. In the note to *Underhill v. Murphy*, a Kentucky case, reported in 4 Ann. Cas., page 784, the annotator says:

"A court of equity has jurisdiction to enjoin picketing, intimidation of employees, and acts of violence, where they are likely to cause irreparable injury to the employer's business and property, though the acts sought to be restrained are punishable as criminal offenses. [Citing a number of cases.] One of the leading cases on the general subject of the jurisdiction of equity to restrain by injunction unlawful interference with business and property rights by strikers, notwithstanding the fact that the acts restrained are punishable as criminal offenses, is that of *In re Debs*, 158 U. S. 564."

But, whatever the rule may be elsewhere, this court, in the case of *Jensen v. Cooks' & Waiters' Union*, 39 Wash. 531, 81 Pac. 1069, 4 L. R. A. (N. S.) 302, where this exact question was under consideration, said:

"The vital question at issue, however, it seems to us, is a simple one and easy of solution. Clearly, the acts of the appellants and defendants, as set forth in the complaint, are illegal and may be restrained by an injunction. It is true that a man, not under contract obligations to the contrary, has the right to quit the service of another at any time he sees fit, and may lawfully state, either publicly or privately,



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the grievances felt by him which gave rise to his conduct. And that right which one man may exercise singly, many may lawfully agree, by voluntary association, to exercise jointly. But one man singly, nor any number of men jointly, having no legitimate interests to protect, may not ruin the business of another by maliciously inducing his patrons and other persons not to deal with him. Men cannot lawfully jointly congregate about the entrance of one's place of business, and there, either by persuasion, coercion, or force, prevent his patrons and the public at large from entering his place of business or dealing with him. To destroy his business in this manner is just as reprehensible as it is to physically destroy his property. Either is a violation of a natural right, the right to own, and peaceably enjoy, property."

The respondents seek to distinguish that case from the one at bar by reason of the fact that, in that case, there was a demurrer to the complaint and the facts were admitted, while in the case at bar the facts were disputed and the case was tried out upon the merits. We think there is no merit in this distinction. Here, the case was tried upon the merits, but the facts, as shown by the record, are clear to the effect that the grievance of the respondents was that St. Germain's bakeries and stores were unfair to organized labor. The respondents, for that reason, maintained pickets on the sidewalk in front of the appellants' places of business. The only object of maintaining these pickets was to intimidate these appellants and their patrons. There could have been no other object, because the union laborers had been called out. They were not working there, and in order to require these appellants to employ union labor, the respondents sought to, and did, intimidate the public from entering the stores and dealing with the appellants. Whether these facts were alleged in a complaint which was undenied, or were proven upon a trial, makes no difference. Whether the picketing was peaceable or otherwise, under the facts in this case, is entirely immaterial, because the sole object of the respondents was to intimidate, not only the public, but also these appel-

lants, and force them to enter into a contract which they were unwilling to enter into.

The books are full of cases to the effect that:

"The right to carry on a lawful business without obstruction is a property right, and its protection is a proper object for the granting of an injunction." *Nashville, C. & St. L. Ry. Co. v. McConnell*, 82 Fed. 65 (syllabus).

See, also, *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Purvis v. Local No. 500 United Brotherhood of Carpenters and Joiners*, 214 Pa. St. 348, 63 Atl. 585, 112 Am. St. 757, 12 L. R. A. (N. S.) 642.

In *Commercial Bindery & Printing Co. v. Tacoma Typographical Union No. 170*, 85 Wash. 234, 147 Pac. 1143, this court said:

"To destroy a business is not different from the destruction of physical property. If employees may be intimidated while in their employment, the business of the employer may be destroyed. It is as much the duty of the court to restrain conduct which will have the effect of destroying the business as it is to prevent the destruction of physical property."

See, also, *Jones v. Leslie*, 61 Wash. 107, 112 Pac. 81, Ann. Cas. 1912B 1158, 48 L. R. A. (N. S.) 893; *Huntworth v. Tanner*, 87 Wash. 670, 152 Pac. 523. In *Huntworth v. Tanner* we said, at page 684:

"The holdings of this court are strictly in accord with the idea that the right to peacefully pursue an avocation is more than a personal right."

In the case of *Yick Wo v. Hopkins*, 118 U. S. 356, the supreme court of the United States said:

"But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the com-

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monwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

The idea upon which picketing by any means cannot be sustained is that it intimidates the public from entering into the place, and doing business with a person before whose store or place of business a line of guards is stationed. Where a line of guards, consisting of one or more, is stationed in front of a place of business, every one knows that such guard is there for the purpose of intimidating and preventing the public from dealing with the person whose place of business is picketed. That this is contrary to the spirit of our institutions, and the right to conduct a lawful business in a lawful way, without molestation of other persons, needs no argument to sustain it. 16 R. C. L., page 453. The cases are numerous to that effect.

In *Pierce v. Stablemen's Union, Local No. 8760*, 156 Cal. 70, 103 Pac. 324, the supreme court of California said:

"A picket, in its very nature, tends to accomplish, and is designed to accomplish, these very things. It tends to, and is designed by physical intimidation to, deter other men from seeking employment in the places vacated by the strikers. It tends, and is designed, to drive business away from the boycotted place, not by the legitimate methods of persuasion, but by the illegitimate means of physical intimidation and fear. Crowds naturally collect; disturbances of the peace are always imminent and of frequent occurrence. Many peaceful citizens, men and women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. It is idle to split hairs upon so plain a proposition, and to say that the picket may consist of nothing more than a single individual, peacefully endeavoring by persuasion to prevent customers from entering the boycotted place. The plain facts are always at variance with such refinements of reason."

In *Barnes & Co. v. Chicago Typographical Union No. 16*, 232 Ill. 424, 436, 83 N. E. 940, 14 L. R. A. (N. S.) 18, it was said:

"There have been a few cases where it was held that picketing, by a labor union, of a place of business is not necessarily unlawful if the pickets are peaceful and well behaved, but if the watching and besetting of the workmen is carried to such a length as to constitute an annoyance to them or their employer it becomes unlawful. But manifestly that is not a safe rule and furnishes no fixed or certain standard of what is lawful or unlawful. Any picket line must result in annoyance both to the employer and the workmen, no matter what is said or done, and to say that the court is to determine by the degree of annoyance whether it shall be stopped or not would furnish no guide, but leave the question to the individual notions or bias of the particular judge. To picket the complainants' premises was in itself an act of intimidation and an unwarrantable interference with their rights."

In the case of *Goldberg, Bowen & Co. v. Stablemen's Union*, 149 Cal. 429, 86 Pac. 806, 117 Am. St. 145, 8 L. R. A. (N. S.) 460, where it was averred in the complaint that pickets were stationed in front of plaintiff's place of business, with intent to threaten and intimidate customers of the plaintiff, and defendants threatened to, and did, keep there, representatives and pickets, bearing placards and transparencies, and by that means, intimidated customers from entering said place of business, it was said:

"It cannot be successfully contended that the said acts of defendants committed immediately in front of plaintiff's place of business as aforesaid, could not, in the nature of things, have had the effect of intimidating plaintiff's patrons, and as it is averred that they did have that effect, the fact of such intimidation must, for the purpose of this case, be considered as established. And such acts, having such effect, undoubtedly interfered with and violated plaintiff's constitutional right to acquire, possess, defend, and enjoy property."

In the case of *Union Pac. R. Co. v. Ruef*, 120 Fed. 102, it was said:

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"This 'picketing' has been condemned by every court having the matter under consideration. It is a pretense for 'persuasion,' but is intended for intimidation. Gentlemen never seek to compel and force another to listen to the art of persuasion. To stop another on the street, get in his road, follow him from one side of the street to another, pursue him wherever he goes, stand in front of his residence, is not persuasion. Intimidation cannot be defined. Neither can fraud be defined. But every person knows whether his acts are fraudulent, and he knows whether his acts are intimidating."

In the case of *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 77 N. W. 13, 74 Am. St. 421, 42 L. R. A. 407, it was said:

"To picket complainants' premises in order to intercept their teamsters or persons going there to trade is unlawful. It itself is an act of intimidation, and an unwarrantable interference with the right of free trade. The highways and public streets must be free to all for the purposes of trade, commerce, and labor. The law protects the buyer, the seller, the merchant, the manufacturer, and the laborer in the right to walk the streets unmolested. It is no respecter of persons; and it makes no difference, in effect, whether the picketing is done 10 or 1,000 feet away."

The authorities are numerous to the same effect. By authority, therefore, as well as by reason, the opinion of this court in *Jensen v. Cooks' & Waiters' Union*, *supra*, is amply sustained. That case is controlling of the facts in this case, and it was, therefore, the duty of the trial court to grant the injunction prayed for.

Appellants insist that they are entitled to damages. The record shows, beyond dispute, that there was a large falling off in the appellants' business immediately after pickets were stationed in front of the premises, and while it is plain that the appellants are entitled to recover the damages they have suffered by reason of the unlawful picketing, we find nothing in the record upon which to base a judgment for any substantial amount. We find nothing in the record showing

what the profits of the business were. The average gross receipts for many months prior to the picketing complained of amounted to more than \$4,000 per month. Thereafter, the average receipts amounted to little more than \$1,000 per month. But, without a showing of the profits which the appellants made, a judgment for damages cannot be based upon average receipts. We are of the opinion that, under the facts, the trial court should have granted nominal damages.

In the decree, the costs were awarded against certain of the respondents, but not against the unions, which were really the instigators and controlled the picketing, and caused the damage in the case. It is argued by the respondents that costs cannot be awarded against the unions because the unions are not incorporated bodies, but are mere voluntary associations. It is alleged in the complaint that these unions are voluntary organizations, that the membership thereof is in the neighborhood of five hundred, and is so large that it is impracticable to bring all the members thereof before the court, and the officers, therefore, only, are made parties, without bringing all of the members of the unions before the court.

In the case of *Branson v. Industrial Workers of the World*, 30 Nev. 270, 95 Pac. 354, it was held that, in an action in equity against a voluntary unincorporated organization where the members comprising the same were numerous, such organizations might be made parties to an action where a few of the members thereof were made defendants for the purpose of representing the organization; and in that case it was held proper to enter judgment against the organization, as well as against the individual parties who were named as defendants in the case. That case is a learned discussion of the question, and, we think, is conclusive.

It became the duty of the court, therefore, to enter a judgment for damages and costs against all of the respondents.

The judgment appealed from is reversed, and the cause remanded, with instructions to the lower court to grant an injunction, as prayed for, against all of the respondents, and

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against all other persons acting by, through, or under them, and for nominal damages, and for the costs in this court, as well as in the court below.

MAIN, WEBSTER, MORRIS, and PARKER, JJ., concur.

CHADWICK, J. (concurring)—I am not prepared to admit, as suggested in the dissenting opinion, that “the law and equities of this case have been settled by the great weight of authority,” in favor of the respondents. There are some cases holding that picketing, so long as it does not partake of the character of an active intimidation by word or force of arms, is lawful, but the trend of all modern authority is to the contrary. For, from the very nature of things, a court cannot say to men nursing grievances that thus far thou shalt go with the law in thine own hands and no further. To so hold makes the law as weak as human nature is when acting under the passion of numbers, whereas it should be fixed in its principles without compromise as to degree when applied to a like state of facts. No court can lay down a rule fixing a boundary where the right ends and wrong begins, when the facts are not in being and acts are prospective and within the keeping of men who are acting upon their own judgment of the limit of their authority, albeit they are nominally moving under an order of the court.

The *Jensen* case settles this controversy; but, if it were not so, there is sufficient authority to be found in *Jones v. Leslie*, 61 Wash. 107, 112 Pac. 81, Ann. Cas. 1912B 1158, 48 L. R. A. (N. S.) 893. In that case we have the same case presented from the side of the employee. We held that an employer who had discharged a workman could not blacklist his employee. When an employer assumes to take the law in his own hands and to say to the employing world that the one whom he has discharged has offended in some way against him and for that reason alone should not be employed by others, his act is declared to be violative of the “sense of right and justice.” The court, speaking through Judge Dunbar, whose



broad conception of the rights of men was never questioned, said:

“This presents a case here which is purely a question of law. It would be well to remember, in the beginning, that it is fundamental that a man has a right to be protected in his property. This was the doctrine of the common law; is, and always has been, the law in every civilized nation. It is, of necessity, one of the fundamental principles of government, the protection of property being largely one of the objects of government. For the protection of life, liberty, and property, men have yielded up their natural rights and established governments. Is, then, the right of employment in a laboring man property? That it is, we think cannot be questioned. The property of the capitalist is his gold and silver, his bonds, credit, etc., for in these he deals and makes his living. For the same reason, the property of the merchant is his goods. And every man's trade or profession is his property, because it is his means of livelihood; because, through its agency, he maintains himself and family, and is enabled to add his share towards the expenses of maintaining the government. Can it be said, with any degree of sense or justice, that the property which a man has in his labor, which is the foundation of all property and which is the only capital of so large a majority of the citizens of our country, is not property; or, at least, not that character of property which can demand the boon of protection from the government? We think not. To destroy this property, or to prevent one from contracting it or exchanging it for the necessities of life, is not only an invasion of a private right, but is an injury to the public, for it tends to produce pauperism and crime. This relief has been granted to employers in many forms. Workmen have been enjoined from collecting about the employer's place of business for the purpose of ridiculing his employees with a view of causing them to stop work; and many other demonstrations of the same character and purpose have been enjoined, of course, on the theory that it was an unlawful act. To deny the same relief to the employee under similar circumstances would be a reproach to the law. . . .

“It is an excellent rule of action to refrain from interference with the affairs of others, and especially if the motive actuating such interference is to work injury to others.”



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That statement of the law is enough to close this controversy.

Picketing is notice to the world that organized labor has blacklisted an employer.

If it be wrong for the employer to take from the one who labors his capital, which is his right to offer his services in the market for labor, it is equally as wrong for the laborer acting either individually or collectively, whether by peaceful or violent methods (for experience teaches us that either way invites breaches of the peace), to take from the employer the right to pursue his business unrestrained, so long as he does not violate the law of the land. The gist of the case does not lie in the *manner* in which either side proceeds to redress its wrongs, but the test is to be found in answer to the question, whether, under any set of circumstances, a court of equity should affirm the *ex parte* judgment of a person or body of men acting extra-judicially, and put in his hand, or their hands, whether employer or employee, a roving commission to go out and redress a wrong, either real or fancied, in their own way.

Barring a few of the cases referred to in the minority opinion, I know of no instances in the history of jurisprudence where it has ever been contended that a man, whoever and whatever he may be, could be harassed at the will of another whose sole right to interfere with the lawful conduct of that other rested in a difference of opinion upon a question which the law had not assumed to settle or define.

Take the case at bar. Appellants were observing the laws of the land, and of the unions. They employed union labor and paid union wages. Because they refused to discharge a cook who had been vouched for by the union, but who was delinquent in his dues to it, they are condemned as unfair, they are blacklisted, their place is picketed, their peace is molested, and their business seriously interrupted and impaired. To do these things, is the purpose of the respondents, thus coercing obedience to their demands, upon penalty of

ruin. This can be as effectually done by the so called "peaceful" method as by violence. In the *Jones* case, the employer did no more than to peacefully "notify" and "threaten" to withdraw patronage.

Appellants' offense seems to be that they have refused to make of themselves agents for the collection of dues. The right of the union to compel one of its own members to pay dues may be admitted, but it does not follow that it can compel another to become a party, either directly or indirectly, to its internal controversies, or condemn him by star chamber methods, or by judgments rendered in its secret councils.

Upon such methods, the law, which is no more than the expression of that fairness which should exist between man and man, ought to frown. We have condemned trial and condemnation by the employer; by the same rule we are bound to condemn trial and condemnation by the employee.

The *Jones* case is a complete answer to the argument put forth in the minority opinion, and emphasizes the fact that neither the employer nor the laborer can take the law in his own hands; that, if the one comes to this court seeking to restrain the other, he must in turn submit to the same rule when his adversary comes asking for the injunctive processes of the court.

This is but another way of saying that legal principles apply without reference to the calling or occupation of men. In more homely but more expressive phrase, "It is a poor rule that won't work both ways."

"To deny the same relief to the employee [employer] under similar circumstances would be a reproach to the law." *Jones v. Leslie, supra*.

ELLIS, C. J. (concurring)—The authorities generally on the question here presented are hopelessly divided. But the question is no longer an open one in this state. There is no material difference between the facts established by the proofs here and those admitted by the demurrer in the case of *Jensen v. Cooks' & Waiters' Union*, 39 Wash. 531, 81 Pac. 1069, 4

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L. R. A. (N. S.) 302. As I read it, this decision is in perfect accord with that in the *Jensen* case. To me it seems that the two cases cannot be soundly distinguished either in law or in fact. So long as that decision stands, it is binding on this court. I am therefore constrained to concur with the majority.

FULLERTON, J. (concurring) — I concur for the reason stated by Chief Justice Ellis.

HOLCOMB, J. (dissenting)—The good faith of the strike in this controversy is not in question.

An examination of the decree set forth in the majority opinion shows that all malevolent, intimidating, and coercive acts were enjoined. Under the terms of the decree there could be no congregating about and no intimidation, coercion, or annoyance of either employees or prospective employees or patrons of the places of business.

This case was tried on facts, and the facts and the law support the decree entered. Notwithstanding what was said in *Jensen v. Cooks' & Waiters' Union*, 39 Wash. 531, 81 Pac. 1069, 4 L. R. A. (N. S.) 302, where was sustained a complaint which, among other things, alleged congregating about the business entrance, and illegal, coercive and intimidative acts, and injuries and damages resulting therefrom, and although the court in passing upon the allegations of the complaint made the observations quoted in the majority opinion, those observations were not entirely pertinent to the question there involved, were not necessary, and part of them are manifestly mere *obiter*.

The law and the equities of this case seem to me to be settled by the very great weight of authority contrary to the decision of the majority.

One of the leading cases on this question and one which has been often cited by other courts is that of *Karges Furniture Co. v. Amalgamated Woodworkers Local Union No. 131*, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788. In that case, as a threshold proposition, it was held that a trade union

consisting of an unincorporated association of artisans cannot be sued in its company name in the absence of statute authorizing it, but must be sued in the name of all the individual members thereof. In this state we have no statute authorizing voluntary associations either to sue or to be sued, and hence these unions were not proper parties to this suit and could not be held liable either generally or for the costs.

The principal proposition determined in that case was, as stated in the syllabus:

"Members of a trade union consisting of employees under no contractual restraint may lawfully combine and by pre-arrangement quit their employment in a body, to secure from their employers an advance in wages, shorter hours, or any other legitimate benefit, though they know at the time that such action will be attended with injury to their employers' business, provided the strike is carried on in a lawful manner and free from force, intimidation, and false representation.

"A trade union during a strike may appoint pickets or a committee to visit the vicinity of factories to take note of the persons employed, and secure by lawful means their names and places of residence, for the purpose of peaceful visitation and solicitation by means other than threats, intimidation, etc."

In the course of the decision in that case, these observations were made:

"A tradesman, singly or in combination with others, may lawfully advertise his goods, undersell, solicit, and win the customers of his rival, knowing that he is thereby ruining the latter's business. This is competition, and is what the law commends as 'the life of trade.' In such case one loses his property by the acts of his neighbor, but it is *damnum absque injuria*. But the contest must be a fair and honest one. If the same tradesman, singly or with others, advertises his goods, undersells, solicits, and wins away the customers of his rival by false representations, intimidation or artifice, not to better himself, but to injure his rival, he has committed an actionable wrong. [Authorities.] . . . Whatever one man may do, all men may do, and what all may do singly they may do in concert, if the sole purpose of the combination is to advance the proper interests of the members, and it is con-

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ducted in a lawful manner. [Authorities.] . . . It is argued that the maintenance of pickets at the plaintiff's factory was an unlawful interference with its business, and that the appointment of, instruction to, and the receiving of daily reports from such pickets constituted all participating members of the union civil conspirators. Whether picketing is lawful or unlawful, depends in each particular case upon the conduct of the pickets themselves. . . . Under no circumstances have pickets the right to employ force, menaces, or intimidation of any kind in their efforts to induce non-striking workmen to quit, or to prevent those about to take the strikers' places to refrain from doing so; neither have they the right, as pickets or otherwise, to assemble about the working place in such numbers or in such manner as to impress workmen employed, or contemplating employment, with fear and intimidation. [Authorities.] . . . The law, having granted workmen the right to strike to secure better conditions from their employers, grants them also the use of those means and agencies, not inconsistent with the rights of others, that are necessary to make the strike effective. This embraces the right to support their contest by argument, persuasion, and such favors and accommodations as they have within their control. The law will not deprive endeavor and energy of their just reward, when exercised for a legitimate purpose and in a legitimate manner. [Authorities.] . . . The decided cases are not in harmony with respect to the right to persuade, but the clear weight of authority is to the effect that so long as a moving party does not exceed his absolute legal rights, and so does not invade the absolute rights of another, he may do as he pleases, and may persuade others to do like him [Authorities.]”

In *Iron Moulders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 20 L. R. A. (N. S.) 315, decided by the circuit court of appeals of the seventh circuit, Grosscup, Baker, and Seaman, Judges, portions of a decree entered by the district judge below enjoining the members of the union from in any manner directly interfering with, hindering, obstructing, or stopping the business of complainant or its agents, servants, or employees in the maintenance, conduct, management or operation of its business, and enjoining them from using per-

suasion and from enforcing, maintaining, or aiding in illegal boycott against the company, its agents, or employees, and from endeavoring to illegally induce people not to deal with the company, its agents and employees, were among other things in the decree vacated; and a provision of the decree enjoining the strikers from congregating upon or about the company's premises or the sidewalk, streets, alleys, or approaches adjoining or adjacent to or leading to the premises, and from picketing the complainant's place of business, etc., was modified by the circuit court of appeals so as to provide only for injunction against such *congregating* in such places and picketing *in a threatening or intimidating manner*. The court quoted with approval the *Karges Furniture Co.* case above cited, and a great number of other cases by both state and Federal courts, and in the course of the decision observed:

"But attempts to injure each other by *coercing* members of society who are not directly concerned in the pending controversy to make raids in the rear cannot be tolerated by organized society, for the direct, the primary, attack is upon society itself. And for the enforcement of these mutual rights and restraints organized society offers to both parties, equally, all the instrumentalities of law and of equity. With respect to picketing as well as persuasion, we think the decree went beyond the line."

The above case was followed but very recently in *Tri-City Cent. Trades Council v. American Steel Foundaries*, in the circuit court of appeals, seventh circuit, decided December 6, 1916, 238 Fed. 728. In the course of this decision these arguments were made:

"The right to strike to secure higher wages and improved conditions of labor is too firmly established to necessitate further elucidation. From the record here we can reach no other conclusion than that the object of this strike was to secure for plaintiff's employees the November wage scale of the union. Nothing appears in the record to indicate that this was not in good faith, or to raise the suspicion that the strike was a mere cloak to cover a deliberate purpose to interfere

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with the plaintiff's conduct of its business, or to injure and destroy its business and property. The purpose being lawful . . . picketing may be employed, as this court has held, . . . ;"

citing and quoting the *Allis-Chalmers* case. It was concluded that:

"In so far as the decree restrains all picketing and all persuasion and all interference with the plaintiff's free and unrestrained control of its plant and the operation of its business, it transcends the limit of proper restraint, and should be modified, so as to eliminate therefrom any restraint of defendants from doing unlawful acts as indicated herein."

It was ordered that the decree be modified to conform to the decree in the *Allis-Chalmers* case.

The opinion in the above case cited the following cases and authorities in support of these views: *Allis-Chalmers* case, *supra*; *Karges Furniture Company* case, *supra*; 7 Labatt, Master & Servant, p. 8364; *Everett-Waddey Co. v. Richmond Typographical Union No. 90*, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792; *In re Heffron*, 179 Mo. App. 639, 162 S. W. 652; *Jones v. Maher*, 62 Misc. Rep. 388, 116 N. Y. Supp. 180; *Jones v. Van Winkle Gin & Machine Works*, 131 Ga. 336, 62 S. E. 236; 127 Am. St. 235, 17 L. R. A. (N. S.) 848; *Pope Motor Car Co. v. Keegan*, 150 Fed. 148. See, also, *Foster v. Retail Clerks' International Protective Ass'n*, 39 Misc. Rep. 48, 78 N. Y. Supp. 860; *Butterick Pub. Co. v. Typographical Union*, 50 Misc. Rep. 1, 100 N. Y. Supp. 292; *Searle Mfg. Co. v. Terry*, 56 Misc. Rep. 265, 106 N. Y. Supp. 438; *Gray v. Building Trades Council*, 91 Minn. 171, 97 N. W. 663, 103 Am. St. 477, 63 L. R. A. 753; *Minnesota Stove Co. v. Cavanaugh*, 131 Minn. 458, 155 N. W. 638; *Beaton v. Tarrant*, 102 Ill. App. 124; *Parkinson Co. v. Building Trades Council of Santa Clara County*, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550; *Lindsay & Co. v. Montana Federation of Labor*, 37 Mont. 264, 96 Pac. 127, 127 Am. St. 722, 18 L. R. A. (N. S.) 707. All

these decisions are by courts of very high repute and authority.

Upon the reasoning of the foregoing authorities, I am impelled to dissent from the majority opinion, and to hold that the decree of the lower court should in all respects be affirmed.

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[No. 14009. Department Two. July 20, 1917.]

THE STATE OF WASHINGTON, *Respondent*, v. W. W. WRIGHT,  
*Appellant*.<sup>1</sup>

CRIMINAL LAW—VENUE—CHANGE—DISCRETION—LOCAL PREJUDICE—REVIEW. The denial of a change of venue in a criminal case on account of local prejudice rests in the sound discretion of the trial court, and no abuse of discretion is shown, where it appears that on a former trial a jury disagreed and statements of the trial judge criticizing the jury and commenting upon the sufficiency of the evidence were published in the newspapers, but affidavits were filed to the effect that no prejudice was created by such publications and that defendant could have a fair trial in the county.

CRIMINAL LAW—TRIAL—MISCONDUCT OF COUNSEL IN ARGUMENT. It is not error for the prosecuting attorney to state in argument that he fully believed in the guilt of the accused, where it was in reply to a statement that he did not have the courage to dismiss when a former jury disagreed.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered July 12, 1916, upon a trial and conviction of rape. Affirmed.

*Gordon & Easterday, Belcher & Gordon, and G. C. Nolte,* for appellant.

*Fred G. Remann, J. W. Selden, Geo. M. Thompson, and Myron C. Cramer,* for respondent.

MOUNT, J.—The appellant was convicted of the crime of carnally knowing a female child. He appeals from a sentence imposed upon him after a verdict of the jury. He makes

<sup>1</sup>Reported in 166 Pac. 645.



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two assignments of error; first, that the court erred in denying an application for a transfer of the cause to some other county for trial; and second, for misconduct of the prosecuting attorney in his closing argument to the jury.

It appears that there had been a former trial of the case to the court and a jury. The jury upon the former trial disagreed, and was discharged by the court. In discharging the jury after their failure to agree, the court said to the jury:

"If a jury cannot convict under such evidence as was presented in this case, then no twelve-year-old girl in the county will be safe from attack. The evidence presented by the state, in my opinion, was entirely reliable, of a strength seldom heard in this court and of a character seldom presented in a case of this kind. It convinced me beyond doubt of the guilt of the defendant. It seems to me that this jury could not have taken its responsibilities in the same light as the court. A jury is a part of the court; its duties are just as weighty, and it should take its responsibilities with equal seriousness."

Subsequently, a motion for a change of judges and for a change of venue was made by the appellant. This motion was supported by several affidavits to the effect that these statements of the court were published in a number of newspapers in the county which were generally read, and created a prejudice against the appellant. Several affidavits on behalf of the state were filed to the effect that no prejudice was created by the publication of these statements of the court, and that there was no general prejudice in the county against the appellant, and that he could have a fair trial. After the motion was made, the judge who tried the case the first time transferred the case to another department of the same county, and the judge to whom the case was transferred, after considering the affidavits, denied the motion.

It is argued by the appellant, in support of his first contention, that, upon the showing thus made, it was reversible error of the trial court to refuse a change of venue. The

appellant relies upon the case of *State v. Hillman*, 42 Wash. 615, 85 Pac. 68. We think that case was a much stronger case than this. In the *Hillman* case, a number of affidavits were filed which alleged that:

“There was an organization known as the ‘Hillman Victim Association,’ composed of a large number of people, organized for the purpose of creating public sentiment against appellants, and particularly against appellant Hillman, which said association by means of public meetings and individual efforts, and by mailing postal cards reflecting upon the character of said Hillman, had done much to arouse prejudice against these appellants; . . .”

These affidavits were not controverted by the state, and apparently there was no counter showing. In that case, we took the facts stated in the affidavits as being true, and for that reason held it was error in the trial court not to grant a change of venue. While it is no doubt true that the articles above mentioned were published in many of the papers in Pierce county where the action was tried, it is disputed that there was any general sentiment against the appellant, and it was for the court then to exercise its sound judicial discretion and decide whether a change of venue should be granted to another county. In the case of *State v. Welty*, 65 Wash. 244, 118 Pac. 9, after referring to §§ 2018 and 2019, Rem. & Bal. Code, with reference to a change of venue to some other county, we said:

“It is apparent, from a reading of these sections, that the granting or denying of the change of venue is a matter resting entirely in the sound judicial discretion of the trial judge. Such being the statute, the ruling of the trial court cannot be reversed upon appeal, unless the record contains some evidence of its gross abuse, or it is shown that the court’s ruling was arbitrary. Such has been our holding whenever such a question has been before us.” Citing a number of cases.

And then, further on in the same opinion, we said:

“It must appear, before we would be justified in reviewing the trial court’s ruling, that the community has been so

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warped by the passion and prejudice of the newspaper articles complained of that there is danger of the trial jury being so influenced by such publication as to give heed to them rather than to the evidence in reaching a verdict." Citing a number of cases.

We think this is a correct statement of the rule of law with reference to this assignment of error, and we think it does not appear that the court abused its discretion in denying the motion.

Upon the other assignment of error, it appears that, when counsel for the defense was addressing the jury, he made a statement, saying:

"I say that these men after this man has once been tried and when one jury had already disagreed on the facts in this case—when one jury has already stood eleven to one for acquittal, these men come here—"

Counsel was then interrupted by an objection from the prosecuting attorney, and the court remarked: "Counsel should not refer to that. This jury knows nothing about that." Counsel then resumed, saying:

"Well, it is in the record that the jury disagreed,—and inasmuch as they did not have the courage to give this man his liberty and dismiss this matter, you owe it to the commonwealth to give this man his liberty and permit this child to be restored to the arms of her parents. . . . I want you to have the courage that the state's attorneys did not have in this case after what has transpired, and do the things that they should have done long ago."

When the prosecuting attorney came to reply, he said:

"Counsel says that we should not have brought this case this time, and my answer to that is this, that we fully believe the defendant guilty or we would not have brought him to trial here."

It is argued by the appellant that this statement of the prosecuting attorney constitutes reversible error, citing a number of cases from this court, among them being that of *Rangenier v. Seattle Elec. Co.*, 52 Wash. 401, 100 Pac. 842,

and *State v. Armstrong*, 37 Wash. 51, 79 Pac. 490, where we said:

“It is no part of the duty of the advocate to obtrude his personal opinion upon the jury, either as to the veracity of a witness or the weight of the evidence.”

And:

“While it is improper for a prosecuting attorney, in argument, to express his individual opinion that the accused is guilty, independent of the testimony in the case, he may nevertheless argue from the testimony that the accused is guilty, and that the testimony convinces him of that fact.”

A number of other cases are cited to show that it is no part of the duty of the prosecuting attorney to indicate his personal opinion to the jury. The remark objected to was brought about by what had theretofore been said by counsel for the defense, in which the prosecuting attorney was charged with not having the courage to give the appellant his liberty. Counsel insinuated by this remark that the prosecuting attorney did not believe the appellant was guilty, but did not have the courage to dismiss the action. Thereupon, the prosecuting attorney answered by saying that he fully believed the defendant guilty, or he would not have brought him to trial.

“Remarks of the prosecuting attorney which ordinarily would be improper are not ground for exception if they are provoked by defendant’s counsel and are in reply to his statements.” 12 Cyc. 582.

We are satisfied that this is the correct rule, and, since the remark of the prosecuting attorney was called forth and provoked by remarks of counsel for the defense, the remark made was not error.

We find no error in the record, and the judgment is therefore affirmed.

ELLIS, C. J., PARKER, FULLERTON, and HOLCOMB, JJ., concur.

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Statement of Case.

[No. 13521. *En Banc*. July 21, 1917.]

ARTHUR SCHRAMM, JUNIOR, *as Trustee, Appellant*, v.  
JOHN STEELE *et al.*, *Respondents*.<sup>1</sup>

HUSBAND AND WIFE—COMMUNITY PROPERTY—LIABILITY FOR TORT OF HUSBAND. Since the liability of the community for the torts of the husband rest upon the statutory agency of the husband and exists only where the rule of *respondeat superior* applies, the community personalty is not liable for a judgment against the husband for alienating the affections of plaintiff's wife.

SAME—COMMUNITY PROPERTY—LIABILITY FOR SEPARATE DEBTS—AGENCY OF HUSBAND—STATUTES. Neither the husband nor wife having any independent proprietary interest in the community property, either real or personal, Rem. Code, § 5917, giving the husband the management and control of the community personal property, with like power of disposition as he has of his separate personal property, must be construed to be a management and control in the community interest, and merely vests him with absolute discretion in the voluntary disposition of the community personalty, and does not subject the same to involuntary sale to satisfy the husband's separate debts (overruling *Powell v. Pugh*, 13 Wash. 577, *Gund v. Parke*, 15 Wash. 393, and *Morse v. Estabrook*, 19 Wash. 92).

APPEAL—DECISION—STARE DECISIS. The rule of *stare decisis* should not be applied to prevent the overruling of decisions making community personal property liable for the husband's separate debts, since it does not affect the title to real property or affect vested rights in antecedent sales of personalty, and to follow the rule would perpetuate error and sacrifice principle.

Appeal from a judgment of the superior court for King county, Smith, J., entered April 14, 1916, dismissing an action for equitable relief, upon sustaining a demurrer to the complaint. Affirmed.

*Aust & Terhune*, for appellant.

*Scott Calhoun* and *John A. Homer*, for respondent Florence Steele.

*Chas. F. Munday*, for respondent Smithers.

<sup>1</sup>Reported in 166 Pac. 634.

ELLIS, C. J.—Suit in equity in the nature of a creditor's bill to set aside as fraudulent a transfer of personal property made by defendant John Steele to his wife, Florence Steele, and for other equitable relief.

Plaintiff alleges, in substance, that on January 8, 1916, a judgment for \$3,000 was entered in favor of Robert H. Wilson against John Steele in the superior court of King county, upon complaint of Wilson against Steele for alienating the affections of Wilson's wife; that, on January 11, 1916, the judgment was assigned by Wilson to Schramm, plaintiff in this action; that the cause of action upon which the Wilson judgment was based accrued long prior to February 10, 1915; and that defendants John Steele and Florence Steele are, and at all times material were, husband and wife; that, as a marital community, they are the owners of described personal property worth about \$6,000; that, after February 9, 1915, John Steele, without consideration, secretly and for the purpose of evading payment of Wilson's claim, transferred to his wife his community interest in all of their community personal property; that no bill of sale or other instrument evidencing such conveyance was ever filed for record; that, on November 29, 1915, defendants Steele and wife, executed to defendant, E. M. Smithers, a chattel mortgage for \$6,000, covering all of their personal property; that they were not indebted to Smithers in excess of the sum of \$1,000; that the mortgage was given pursuant to a secret agreement between defendants so to incumber the community property as to make impossible the collection of any judgment which Wilson might obtain against Steele; that the title was thus so clouded and apparently incumbered as to make the property wholly unsalable on execution; that plaintiff has no remedy at law; and that defendant John Steele has no property except his interest in the community personal property.

The prayer is that defendants be required to make disclosure of their dealings with the community property; that

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Florence Steele give an accounting of all property and money received by her for and on account of the community; that all transfers made by Steele to his wife be declared null and void, and all personal property of defendants Steele be decreed to be community property; that the amount owing to Smithers be ascertained and that he be required to satisfy his mortgage upon payment of such sum; and that a receiver be appointed to conserve the community property until subjected to levy under plaintiff's execution.

Defendants separately demurred to the complaint upon the ground that the facts stated are insufficient to constitute a cause of action. The demurrers were sustained. Plaintiff electing to abide by his pleading, judgment of dismissal was entered. He appeals.

But two questions are presented. (1) Is the community property of the marital community subject to execution for the payment of a judgment against the husband alone for a tort committed by him alone, not in connection with the community business nor in furtherance of the community interest? (2) Is the complaint fatally deficient through lack of an allegation that the transfer was made after appellant's judgment was obtained?

There are three lines of our own decisions all having a direct bearing upon the first question and creating an impasse which necessitates the overruling or modification of some one of the three.

In the following cases, this court has held that the community personal property can be sold on execution to satisfy a judgment against the husband for his separate debt: *Powell v. Pugh*, 13 Wash. 577, 43 Pac. 879; *Gund v. Parke*, 15 Wash. 393, 46 Pac. 408; *Morse v. Estabrook*, 19 Wash. 92, 52 Pac. 531, 67 Am. St. 723. These decisions have never been followed in any case, nor, so far as we have been able to find, have they even been cited on this point in any of our later decisions. The majority opinion in *Powell v. Pugh*, Judge Gordon dissenting, is based upon a decision of the

territorial court (*Andrews v. Andrews*, 3 Wash. Terr. 286, 14 Pac. 68), in which the bare statement is made and based upon the statute defining community property (which so far as here concerned was the same then as now) without discussion. The other two decisions merely follow the *Powell* case.

In the following cases, this court has held that a person having a claim for damages sounding in tort is a *creditor* of the tort-feasor within the meaning of the statute of 13 Eliz. C. 5, which is the prototype of all statutes touching fraudulent conveyances, and is the common law of this state. That is to say, the tort-feasor is a *debtor* of the injured person within the meaning of the law of fraudulent conveyances. *Bates v. Drake*, 28 Wash. 447, 68 Pac. 961; *Sallaske v. Fletcher*, 73 Wash. 593, 132 Pac. 648, Ann. Cas. 1914D 760, 47 L. R. A. (N. S.) 320; *Allen v. Kane*, 79 Wash. 248, 140 Pac. 534; *Henry v. Yost*, 88 Wash. 93, 152 Pac. 714. These cases involved fraudulent conveyances of real estate but, touching the question who is a creditor and who is a debtor, that circumstance is obviously immaterial.

The third line of decisions involves torts committed by the managing member of the community. In the following cases, this court has held that community real estate cannot be subjected to levy to satisfy a judgment for the husband's tort which was not committed in the management of the community business nor for the benefit of the community. *Brotton v. Langert*, 1 Wash. 73, 23 Pac. 688; *Day v. Henry*, 81 Wash. 61, 142 Pac. 439; *Wilson v. Stone*, 90 Wash. 365, 156 Pac. 12. The opinion in *Day v. Henry* expressly and definitely places these decisions on the ground that, when the tortious act is wholly outside the scope of the husband's authority as manager of the community property, there is no room for the application of the doctrine of *respondeat superior*, and not upon the fact that the community property sought to be levied upon was realty. There is no intimation that a different rule would prevail in case of personalty. The argument in the *Day* case definitely precludes that view.



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In the following cases, this court has held that a liability for the husband's tort which is committed in the management or prosecution of the community business can be enforced against the community property whether real or personal, but only because he is the *agent* acting for the community. These cases rest squarely upon the rule *respondeat superior*. *Kangley v. Rogers*, 85 Wash. 250, 147 Pac. 898; *Woste v. Rugge*, 68 Wash. 90, 122 Pac. 988; *Milne v. Kane*, 64 Wash. 254, 116 Pac. 659, Ann. Cas. 1913A 318, 36 L. R. A. (N. S.) 88; *McGregor v. Johnson*, 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N. S.) 1022.

In not a single case has this court held or intimated that community property, whether real or personal, can be subjected to levy to satisfy a judgment against the husband alone for a tort committed by him alone and not in connection with the community business nor for the benefit of the community. On the contrary, the decisions above cited involving torts committed by the husband, by necessary implication, limit the liability of the community property, whether real or personal, for such torts to cases where it can be said that the tort was committed in the management of the community property or for the benefit of the community. This court is thus definitely committed to the doctrine that, in such cases, the liability of the community property of whatever kind rests solely upon the statutory agency of the husband and only exists where the rule *respondeat superior* can be soundly applied.

Invoking the first two of these lines of decisions, appellant's argument, syllogistically stated, is this: Under the first line, the community personalty is liable for the separate debt of the husband. Under the second line, a liability for damages for the tort of the husband is a debt of the husband within the meaning of the law of fraudulent conveyances. Therefore, the community personal property is subject to execution under a judgment for the husband's tort in whatever connection committed. It is plain that, if there is any

liability of the community personal property for the husband's acts, whether contractual or tortious, not performed in connection with the community business nor for the common benefit, it must be rested upon the provision of the statute, Rem. Code, § 5917, giving the husband the management, control and disposition of the community personalty, and it must be because that provision gives the husband the absolute *proprietary right* in such property and the wife no present right but only a contingent expectancy. Such is, in fact, the sole basis of the decision in *Powell v. Pugh, supra*, and the two cases following it. Simple candor, therefore, compels the admission that, if that view be sound, the community personal property can be subjected to the payment of the husband's separate liability for tort just to the same extent that it can be subjected to payment of his separate contract debt. Either the husband *has* such an absolute proprietary interest in the community personalty, or no act of his, whether contractual or tortious, can bind such property except through his agency for the community. To rest a distinction in this respect upon the technical definition of a debt as distinguished from a liability for tort would be simply absurd. It follows that we are forced either to overrule the case of *Powell v. Pugh, supra*, and the two decisions following it, or to hold that the community personal property is subject to execution for a judgment against the husband alone for a tort committed by him alone and in no manner connected with or redounding to the benefit of the community. The latter course would obviously stultify the reasoning of every one of the third class of decisions hereinbefore cited, where community property generally was held liable for a tort committed by the husband. It would force a shifting of their ground from that of a statutory agency to that of a statutory proprietary right in the husband. This impasse presented by our own decisions forces us to a reconsideration of the ground of decision in the *Powell, Gund,*

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and *Morse* cases. If that ground is sound, the judgment here must be reversed. If it is not sound, the judgment here must be affirmed.

The same circumstances, all of them and no others, which *make* real estate community property make personalty community property. The two kinds of property are impressed with the community character by the same facts and by force of the same words in the same defining statute. All property, whether real or personal, "property and pecuniary rights" without exception, "acquired after marriage by either husband or wife, or both" otherwise than "by gift, bequest, devise or descent," is community property. Rem. Code, § 5917, by reference to §§ 5915 and 5916. It follows that the one kind of property, when so held and acquired, is just as absolutely the property of the community as such as is the other, and that neither member of the community has any independent *proprietary* interest or right in either. It follows, further, that the management and control conferred by statute (*Id.*, §§ 5917 and 5918) on the husband as to both species of property, though differing in its extent as to the two kinds, is a management and control *for the community and in the community interest*. This necessarily results from the fact that it is the statutory entity—the community as such—which owns the property. The provision of the statute entrusting the husband with "the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof" (Rem. Code, § 5917), must be construed in the light of this dominant fact of ownership. The property referred to is "community" property, that is, property belonging to the community. The husband is made, by the statute, the manager, not the owner. His management and control include the power of absolute disposition, but only for the community. Else there is no such thing as a vested property right in the

community as to any personal property, since the husband could give away all such property in any manner he pleased, except by will, at any time during the existence of the community. To hold that the whole substance of the term community property as applied to personalty consists in a mere contingent expectancy of the wife, would make of the term "community personal property" a palpable misnomer. It would take away every community element except the fact that the wife's labors and sacrifices had helped to earn it. It would destroy that equality which it is the obvious purpose of our community property law to conserve.

These considerations make it plain that the statute, in conferring upon the husband the management and control of the community property, though giving him the absolute power of disposition of community personalty, intends no more than to make him the statutory agent of the community. *Marston v. Rue*, 92 Wash. 129, 159 Pac. 111. The words of the statute are certainly no broader than those often employed in general powers of attorney for the management and disposition of personal property; but we have yet to learn of a case in which such a power, however broad, was held to destroy the estate of the donor of the power and subject the property to the personal debts of the attorney in fact. There is no reason, either in the words or purpose of the statute, why the statutory agency created for the same purpose of management should destroy the estate, substitute for it a shadowy defeasible expectancy in the wife, and subject the property to the purely personal debts, whether arising in contract or tort, of the husband. The assertion found in the *Powell* decision that the husband may sell the community personalty "to satisfy his individual debt and pass a good title," even if sound, is only so because the voluntary act of sale is within the scope of the husband's apparent authority as agent. The argument is conclusively answered by the dissenting opinion of Judge Gordon. He points out that the

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husband's power of disposition, whatever its extent, "is to be voluntarily exercised." The authority "presupposes the exercise of discretion and assent, and hence such a sale or disposition of the property is to be distinguished from an involuntary execution sale, wherein the consent of the debtor is wholly immaterial."

We are now clear that Judge Dunbar in the case of *Brotton v. Langert*, *supra*, stated the correct principle when, referring to § 2409 of the Code of 1881, which is in substance the same as § 5917 of Rem. Code, he said: "This section discriminates in favor of one spouse only so far as is actually necessary for the transaction of ordinary business." This necessity is fully met by holding that the husband is the statutory managing agent of the community with an absolute discretion in the voluntary disposition of the community personalty, and that the statutory agency is no broader than a general power of attorney conferring a like discretion which has never been held to destroy the donor's estate by subjecting it *in invitum* to the payment of the attorney's individual debts or to satisfaction of his liability for his individual independent torts.

The rule announced by a divided court in the *Powell* case does not affect titles to real property, nor does it create any *vested property right* in the husband's creditors as such to the community personalty. To overrule that decision and the two which follow it cannot affect rights which have become vested by antecedent sales of such property on execution for the husband's separate debts. *Haskett v. Maxey*, 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379; *Harris v. Jex*, 55 N. Y. 421, 14 Am. Rep. 285; *Kelley v. Rhoades*, 7 Wyo. 237, 57 Pac. 593, 75 Am. St. 904, 39 L. R. A. 594; 7 R. C. L. p. 1010, § 36. It can affect no rule of property, since the husband will still have every right of management, control, and voluntary disposition of the community personalty that he ever had, whatever those rights may be—a thing which it is

unnecessary now to decide. It certainly cannot affect injuriously either the husband, the wife, the community which they compose, nor any vested property rights of third parties. On the other hand, it will restore to our decisions a consonance with the plain policy of our community statute, which is to create and maintain an equality of the husband and wife in their joint earnings so far as the necessities of business management will permit. It will introduce a consistency into our own decisions which is now wholly wanting. These considerations make it plain that the doctrine of *stare decisis* cannot be soundly invoked to preserve the rule of the *Powell* case. The following often quoted language of the supreme court of Indiana seems peculiarly pertinent:

“Much as we respect the principle of *stare decisis*, we cannot yield to it when to yield is to overthrow principle and do injustice. Reluctant as we are to depart from former decisions we cannot yield to them, if, in yielding, we perpetuate error and sacrifice principle. We have thought it wisest to overrule outright rather than to evade, as is often done, by an attempt to distinguish where distinction there is none.” *Paul v. Davis*, 100 Ind. 422, 428.

See, also, *Board of Com'rs of Jasper County v. Allman*, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58; *Truxton v. Fait & Slagle Co.*, 1 Penn. (Del.) 483, 42 Atl. 431, 73 Am. St. 81; *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 27 Colo. 1, 59 Pac. 607, 83 Am. St. 17, 50 L. R. A. 209; *Oliver Co. v. Louisville Realty Co.*, 156 Ky. 628, 161 S. W. 570, Ann. Cas. 1915C 565, 51 L. R. A. (N. S.) 293; *Rumsey v. New York & N. E. R. Co.*, 133 N. Y. 79, 30 N. E. 654, 28 Am. St. 600, 15 L. R. A. 618.

The only possible ground of the *Powell*, *Gund*, and *Morse* decisions has been discredited by our decisions in the *Day*, *Kangley*, *Woste*, *Milne*, *McGregor* and *Marston* cases. We must overrule the former, or modify the latter in such a way as to necessitate the affirmance of the judgment here. We are clear that the *Powell*, *Gund*, and *Morse* decisions are unsound. They are hereby overruled.

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Syllabus.

Since our answer to the first question presented by this appeal must be in the negative, it is obvious that the question of pleading presented by the second is immaterial.

The judgment appealed from is affirmed.

HOLCOMB, MORRIS, MOUNT, MAIN, CHADWICK, and PARKER, JJ., concur.

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[No. 13707. Department One. July 21, 1917.]

RICHARD BRUNER *et al.*, Appellants, v. ELSIE LITTLE *et al.*,  
Defendants and Cross-Appellants, PACIFIC COAST  
CASUALTY COMPANY, Respondent.<sup>1</sup>

MUNICIPAL CORPORATIONS—STREETS—JITNEYS—LIABILITY ON BOND—STATUTES. Under Rem. Code, § 5562-38, requiring a jitney bus operator to give bond conditioned to pay all damages which may be sustained by any person injured by his negligence, and § 5562-39 giving a cause of action against the principal and the surety on the bond "to every person injured . . . for all damages sustained" the same elements of damages for which recovery may be had against the principal enter into and form a part of the liability of the surety.

DEATH—STATUTES—ACTION ON JITNEY BOND. Parents may recover for the death of a minor child, under Rem. Code, § 5562-39, giving a cause of action against the principal and surety on the bond of a jitney bus driver to "every person injured . . . for all damages sustained," which is not restricted to persons physically injured; especially in view of the further concluding provision that the surviving husband and child shall have an action on the bond for the death of the wife or mother, which was clearly intended to supplement the general statutes on the subject of wrongful death, Id., §§ 183, 184, giving a right of action to the wife or child for the death of the husband or father, and to the father or mother for the death of a child, already embraced within the term "any person injured" in the jitney act.

SAME—STATUTES—ACTION ON JITNEY BOND—IMPLIED REPEAL. The concluding clause of Rem. Code, § 5562-39, giving a right of action against the principal and surety upon a jitney bus bond, to the surviving husband or child for the death of the wife or mother, was not intended to exclude recovery by parents for the death of a child, under Id., § 184; as repeals by implication are not favored, and

<sup>1</sup>Reported in 166 Pac. 1166.

§ 5562-39 of the jitney act gives the right of action "to any person injured" and this should be read in connection with the preexisting law on the subject of wrongful death.

MUNICIPAL CORPORATIONS—STREETS—JITNEYS — NEGLIGENCE — EVIDENCE—QUESTION FOR JURY. The negligence of the operator of a jitney bus, who ran down and killed a child, is a question for the jury, where there was evidence that the brakes of the car were defective and that he was exceeding the speed limit, with other evidence from which negligence could reasonably be inferred.

SAME—STREETS—JITNEYS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. Where a child of tender years, killed by a jitney bus, tarried at the street curb, and looked up and down the street before attempting to cross, it cannot be said as a matter of law that she was guilty of contributory negligence in attempting to cross without taking any precautions for her safety.

NEGLECT—CONTRIBUTORY NEGLIGENCE OF PARENT. It is not contributory negligence for parents to permit a child 8½ years old to cross a street unattended in the residential section of a city.

Cross-appeals from a judgment of the superior court for King county, Albertson, J., entered May 13, 1916, in favor of the plaintiffs as to part of the defendants and dismissing as to one defendant, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for wrongful death. Reversed on plaintiffs' appeal; affirmed on defendants' appeal.

*Peterson & Macbride*, for appellants Bruner *et al.*

*S. D. Wingate*, for appellants Little *et al.*

*Geo. McKay* and *Henry S. Noon*, for respondent.

MAIN, J.—The plaintiffs in this action are the parents of Eleanor Bruner, a child eight and one-half years old, who was run over and instantly killed by a jitney bus. The defendants were Elsie Little and Bertram H. De Yoe, the owners and operators of the jitney (which, at the time of the accident, was driven by De Yoe) and the Pacific Coast Casualty Company. The cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiffs in the sum of fifteen hundred dollars. Upon the verdict, judgment was entered in favor of the plaintiffs, and against the



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owners of the jitney. As to the Casualty Company, a judgment of dismissal was entered. The plaintiffs appeal from that portion of the judgment which dismissed the Casualty Company, and the owners appeal from the judgment rendered against them.

The facts necessary to an understanding of the questions presented are, substantially, these: On October 8, 1915, at about the hour of three o'clock in the afternoon, Eleanor Bruner was killed by being run over by the jitney on Eastlake avenue, not far from the intersection of that street with John street. Upon Eastlake avenue, there was operated a double-track street railway, and the traffic upon that street was heavy. The accident happened not in the business district of the city, but in a portion thereof devoted to residential purposes, with the exception of a local store or two. The plaintiffs, at the time, lived on the east side of the street where the accident happened. A few minutes before the accident happened, Eleanor Bruner left her home, came down the steps, crossed the sidewalk and the parking strip, delayed for an instant, looked up and down the street, and then attempted to cross. When she reached a point a foot or two to the west of the west rail of the west street car track, she was struck by the jitney. The street car, going north, had just passed, and a milk wagon was near the curb on the east side. The driver of the jitney, as he was met by the north-bound car, was attempting to pass other automobiles, which were nearer the curb, and he testifies that he saw the child when he was about at the middle point of the street car as it went by. A number of persons who saw the accident testified as to the manner of its occurrence, but, as is usual in such cases, their testimony was not in harmony.

We will first consider the judgment of dismissal as to the Casualty Company. The first question upon this branch of the case is whether the parents constitute a class of persons who are entitled to a judgment against the surety company

under what is generally known as the Jitney Bus Act, ch. 57, Laws of 1915, p. 227 (Rem. Code, § 5562-37 *et seq.*). Section 2 (Id., § 5562-38) of this statute requires a bond to be given "for the faithful compliance by the principal of said bond with the provisions of this act and to pay all damages which may be sustained by any person injured by reason of any careless, negligent or unlawful act on the part of said principal, his agents or employees. . . ." Section 3 (Id., § 5562-39) gives a cause of action against the principal and surety upon the bond to "every person injured . . . for all damages sustained," and then follows a provision that recovery against the surety shall be limited to the amount of the bond. The concluding portion of the section is, "and a surviving husband and child or children shall have action for the death of the wife or mother caused by any such negligence."

The question, then, is whether every person injured is limited to the one physically injured, or whether the parents of the deceased child may recover. As to the principal mentioned in the bond, by the statute his liability is not different from what it was under the law at the time the act was passed, except as affected by the concluding clause of § 3. It is not claimed that the parents may not maintain an action against the principal for the death of their child, but it is contended that, in such case, the judgment cannot go against the surety company. It may be remarked, in passing, that the right to maintain an action cannot, in all cases, be limited to the person or persons physically injured, because, by the concluding clause of section 3, a cause of action is given to a class of persons not physically injured. The purpose of the law was not to change or alter the liability of the principal, but to require the operator of a motor propelled vehicle to file a surety bond, in order that persons injured might be able to recover against a responsible party. The act limits the amount of recovery against the surety, but contains no other limitation, unless the language "every person injured"

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is to be given a restricted meaning. In the recent case of *Singer v. Martin*, 96 Wash. 231, 164 Pac. 1105, it was held that, under the provisions of the statute here quoted, the casualty company was liable for the same elements of damage which might be recovered against the principal, but the recovery against the surety was limited to the amount of the bond. It was there said:

“Appellants’ dominant contention in this connection is that this evidence was inadmissible, especially as against the casualty company, the argument being that the statute (Laws 1915, ch. 57, p. 227; Rem. Code, § 5562-37 *et seq.*) requiring the jitney operator to give a bond, was not intended to provide protection against damages other than to the bodies of persons injured by such conveyance. We find no merit in this contention. By section 2 (Id., § 5562-38), the statute requires the bond to be given ‘for the faithful compliance by the principal of said bond with the provisions of this act and to pay all damages which may be sustained by any person injured by reason of any careless, negligent or unlawful act on the part of said principal, his agents or employees.’ Section 3 (Id., § 5562-39) gives a cause of action against the principal and the surety upon the bond to ‘every person injured . . . for all damages sustained.’ This language is too plain for construction. Clearly this means that the same elements of damages for which a recovery may be had against the principal enter into and form a part of the liability against the surety, the only statutory limitation being that the recovery against the surety shall be limited to the amount of the bond.”

While the holding that the same elements of damages may be recovered against the casualty company as against the principal is not necessarily a holding that the same class of persons who have a right of action against the principal have also an action against the surety, it does show that the act should be given a reasonable construction for the purpose of carrying out the legislative intent.

The words “every person injured” may mean either (a) the person suffering the physical injury, or (b) a person who sustains loss or damage by reason thereof. If the first mean-

ing be adopted, the parents would have no cause of action against the bond; if the second, they would be within the class of persons who suffered loss or damage by reason of the death of the child, and would be entitled to judgment against the casualty company. By Rem. Code, § 183, the wife or children are given a cause of action for the death of the husband or father. *Whittlesey v. Seattle*, 94 Wash. 645, 163 Pac. 193. By § 184, the father, and, in case of his death or desertion, the mother, has a cause of action for the death of a child. *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092, 48 L. R. A. (N. S.) 917. These statutes were in force when chapter 57, Laws of 1915, was enacted. It will be seen that, in neither of these statutes, is a right of action given to the husband or children for the death of the wife or mother. By the concluding clause of section 3 of chapter 57, Laws of 1915 (Rem. Code, § 5562-39), a cause of action is given to the husband or children for the death of the wife or mother. Had it not been the legislative thought, when the jitney law was enacted, that the statutes then in force, giving a cause of action to the wife or children for the death of the husband or father, and a cause of action to the parents for the death of the child, should be considered in interpreting the law, it is unreasonable to suppose that there would have been created a cause of action in favor of the husband or children for the death of the wife or mother, and no provision made for a recovery on the part of the wife or children for the death of the husband or father. It may be with confidence asserted that the legislature did not intend such a harsh and unreasonable result as would follow if the husband or children have a right of action for the death of the wife or mother, but that the wife or children should not have a recovery for the death of the husband or father. If the parents have no cause of action against the casualty company for the death of a child, it would necessarily follow that the wife or children would not have such a cause of action for the death of the husband or father. It seems plain to us that the legislative intent was

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that the words, "every person injured," should not be restricted to the person suffering the physical injury, but should be given their broader meaning as including the class of persons who would suffer loss or damage. If this were the sense in which the words were used, then the parents, under § 184 of the code, would be entitled to maintain an action for the loss or damage which they had sustained by reason of the death of the child. In *French v. Mascoma Flannel Co.*, 66 N. H. 90, 20 Atl. 363, the supreme court of New Hampshire construed a statute of that state which provided that, when the death of a person was caused by the wrongful act or neglect of another, which, if death had not ensued, would entitle the person injured to recover damages therefor, then, on the death of such person, his executors or administrators could recover damages for the "injury to the person" and estate of the deceased, and it was there held that the word "injury" includes (a) the injury to the person physically hurt, until he dies, and (b) the injury to his widow or children by reason of his death. It was there said:

"In addition to the injury to the deceased and to his estate, there may be recovered the injury to his family occasioned by his death. The word 'injury' in section 1, includes (1) the injury to the person injured until he dies, and (2) the injury to his widow, children, or heirs by reason of his death."

The next question on this branch of the case is whether the fact that the legislature created a cause of action in favor of the father or children for the death of the wife or mother indicates an intention to exclude recovery for another class of persons. Section 184 of the code, as already stated, gives a cause of action to the father, and, in case of his death, or desertion of his family, to the mother, for the death of a child. The class of persons that may recover under this statute is different from the class that may recover under the clause found in section 3 of the jitney act. Repeals by implication are not favored, and will only be indulged where the

implication is a necessary one. In *Mesher v. Osborne, supra*, it was said:

“Repeals by implication are not favored and will only be indulged where the implication is a necessary one, that is, where without an implied repeal of the earlier act there would exist an inharmony in the body of the law irreconcilable on any conceivable theory reasonably compatible with the purpose of the later act.”

If the preexisting law is to be read in connection with the jitney act, as we believe it should, there is no inharmony in giving force and effect to both § 184 of the code, and the concluding clause in section 3 of that act. We think that the legislature, by giving a cause of action to the husband and father for the death of the wife or mother, did not intend to deny a recovery to the parents for the death of a child.

Upon the appeal of De Yoe and Elsie Little, the first point presented is based upon the assumption that the casualty company was not a proper party to the action. In view of what has already been said, we need not further consider this question.

The two other questions presented by these appellants are, first, that no negligence was shown; and second, that both the child and its parents were guilty of contributory negligence. Upon the question of the negligence of the driver of the jitney, there was evidence that the brakes of the car were defective, and that, at the time of the accident, the speed limit fixed by the ordinance of the city was being exceeded. There is also evidence from which negligence could reasonably be inferred in view of the attendant circumstances, even though the jitney was being driven within the speed limit fixed by the ordinance. Without further review of the evidence, it may be stated that we think the question of negligence was plainly one for the jury. Upon the question of contributory negligence on the part of the child, the evidence shows that the child, before attempting to cross the street, tarried at the curb, looked up and down the street, and then

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attempted to cross. It cannot be said, under this evidence, that she attempted to cross without taking any precautions for her safety and, therefore, was guilty of contributory negligence. As to the parents, it was not contributory negligence for them, as a matter of law, to permit a child, eight and one-half years old, to cross the street unattended. *Tecker v. Seattle, Renton & Southern R. Co.*, 60 Wash. 570, 111 Pac. 791, Ann. Cas. 1912B 842; *Sundstrom v. Puget Sound Traction, Light & Power Co.*, 90 Wash. 640, 156 Pac. 828.

The judgment against De Yoe and Elsie Little will be affirmed. The judgment dismissing the Pacific Coast Casualty Company will be reversed, and the cause remanded with direction to the superior court to enter a judgment against that company upon the verdict.

ELLIS, C. J., MORRIS, and WEBSTER, JJ., concur.

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[No. 13936. Department Two. July 21, 1917.]

ALEX. PALTRO, *Appellant*, v. JOSEPH GAVENAS, *Respondent*.<sup>1</sup>

JUDGMENT—DEFAULT—VACATION OF DEFAULT—FRAUD—PETITION—SUFFICIENCY. The holder of a prior unrecorded mortgage is entitled to the vacation of a default judgment foreclosing his rights at the suit of a subsequent mortgagee having notice and conspiring with the mortgagor, where it appears that he did not understand the English language, and was told that the papers served were a summons to appear as a witness and that the attorney was protecting his interests; and a petition for the vacation setting forth such facts is sufficient to require the court to take testimony to determine whether there exists substantial evidence to sustain *prima facie* the allegations.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered September 20, 1916, denying a petition to vacate a judgment. Reversed.

H. R. Lea, for appellant.

<sup>1</sup>Reported in 166 Pac. 1156.

MOUNT, J.—This is an appeal from an order of the lower court, denying the appellant's petition to set aside a default judgment and vacating an order restraining the sale of mortgaged property.

The facts are substantially as follows: On August 4, 1913, Joseph Gavenas loaned to William Kavalauskas and wife \$250, and, to secure the repayment thereof, took a mortgage upon lot 8 and the west half of lot 9, in block 8345, in the Indian addition to the city of Tacoma. This mortgage was not filed for record by Mr. Gavenas until the 8th day of April, 1916. In the meantime, on September 8, 1913, the appellant loaned to William Kavalauskas and wife \$600, and, to secure the note, took a mortgage for that amount upon the property theretofore mortgaged to Mr. Gavenas. Appellant's mortgage was duly recorded. Thereafter, on April 12, 1916, Mr. Gavenas brought an action against Kavalauskas and wife and appellant to foreclose the mortgage for \$250. It was alleged in the complaint of Mr. Gavenas that, at the time he took the mortgage, he was told by the mortgagors that it would not be necessary for him to record his mortgage as it would cost plaintiff much money, and that they intended to pay the note in less than a year; that Mr. Gavenas was a Lithuanian by birth, and did not speak or understand the English language, and was ignorant of the necessity of recording his mortgage to protect his interests; that he believed that the mortgagors were advising him for his own best interest, and for that reason the mortgage was not recorded. The complaint also alleged that this appellant, who was made a defendant in the foreclosure action, held a mortgage for \$600 against the same property, but that appellant, at the time he took his mortgage, knew of the unrecorded mortgage held by the plaintiff for \$250; that he conspired with the mortgagors to defraud the plaintiff by attempting to render plaintiff's mortgage subject to the latter mortgage.



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Appellant was served with a copy of the complaint and summons in that case. He did not appear therein, and a judgment was entered by default on August 4, 1916. This judgment decreed the mortgage of appellant subsequent to the mortgage of the plaintiff. Thereafter, on September 15, 1916, appellant filed a petition to vacate the default judgment. It is alleged in the petition that appellant is of Polish descent, twenty-six years of age, that he is not versed in the English language and does not understand the legal terms and proceedings in the courts; that, on the 8th day of September, 1913, he loaned to William Kavalauskas and wife \$600 upon their promissory note secured by a mortgage upon the property in question; that, at the time he made the loan, he had no notice or knowledge that any other person claimed an interest in the property, or that Mr. Gavenas had a mortgage thereon; that, in good faith, he believed his mortgage was a first lien upon the property until after the judgment had been obtained; that, during the month of April, 1916, the attorney for Mr. Gavenas in the foreclosure action had a conversation with appellant, and caused him to believe that, as attorney, he was acting for appellant in sustaining appellant's mortgage upon the property; that some papers were left with appellant by the attorney, but these papers were understood to summons appellant as a witness in the case, and that he did not understand that his rights under the mortgage were being attacked, and did not understand that he was required to appear and answer the complaint in the mortgage foreclosure; that, by reason thereof, he failed to appear and protect his interest under his mortgage, and did not authorize any one to appear for him; that he did not know that his mortgage was being attacked until the 14th day of September, 1916, after the default judgment had been entered. He alleged in his petition that all the other parties to the action were insolvent. He also alleged that Mr. Gavenas and the other defendants were attempting to defraud him out of the \$600 which was secured by his mortgage

aforesaid. When this petition was filed, the trial court entered an order restraining further proceedings under the judgment obtained by Gavenas against Kavalauskas and wife and the appellant. Thereupon, a motion was filed on behalf of Gavenas to vacate the restraining order, and the lower court, upon a hearing, denied the petition upon the allegations thereof, and vacated the restraining order. This appeal followed.

We are not informed upon what grounds the trial court held the petition insufficient. The respondent has not appeared in this court. It seems clear to us that the facts stated in the petition are sufficient to set aside the default judgment. If the allegations of the petition are true, to the effect that Mr. Paltro did not know of the unrecorded mortgage at the date his mortgage was given, his mortgage is clearly a prior mortgage upon the premises. If he did know of the other mortgage, his mortgage would not be a prior one. If the fact is that he did not understand the English language, as he alleges in his petition, and was told by counsel for Mr. Gavenas that counsel was protecting appellant's interest under the mortgage, and was told that the papers served upon appellant required him to be only a witness in that case, it seems this would be a sufficient excuse for appellant's nonappearance in the foreclosure case. In *Bast v. Hysom*, 6 Wash. 170, 32 Pac. 997, we held that, where a judgment has been taken against defendant by default for his failure to answer, the judgment should be set aside when it appears that he had a defense upon the merits of the case and was misled by the statement of the attorney that the cause would be tried several months later than the time at which the default was taken. It clearly appears here, from the allegations of the petition to vacate the judgment, that the petitioner has a defense against the unrecorded mortgage. He did not understand the English language and was led to believe by counsel for respondent that his rights were not

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being affected, and for that reason he did not appear to contest the foreclosure of the unrecorded mortgage.

The rule is that, where the judgment sought to be vacated is not void for lack of jurisdiction, but is merely voidable because irregularly or fraudulently procured, it will not be vacated until the court has found, not only that the facts alleged in the petition to vacate constitute a defense, but also that there is substantial evidence to support at least *prima facie* the matter of defense so alleged.

In *Williams v. Breen*, 25 Wash. 666, 66 Pac. 103, this court said:

“The statute provides (§ 5158) [Rem. Code, § 469] that a judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered. In the case before us the trial court made the necessary adjudication; but it is said this could only be done after a trial of the defense upon its merits, and that here there was no such trial. But the statute cannot mean that the court must hear the entire cause, and grant the petition only when it appears that the evidence preponderates in favor of the applicant. The weight and sufficiency of evidence in this form of action are questions for a jury. It is sufficient to determine the question here presented, that the court finds that the facts alleged constitute a defense to the cause of action stated in the complaint, and that there is substantial evidence to support the allegations.”

In *Tacoma Lumber & Mfg. Co. v. Wolff*, 7 Wash. 478, 35 Pac. 115, 755, this court said:

“All courts hold, and we have frequently done so, that it is not enough to entitle a party to have a judgment against him vacated, that he should show that it had been irregularly entered; he must, in addition thereto, establish to the satisfaction of the court the fact that such judgment is unjust and inequitable as against him. Proceedings of this kind are of an equitable nature, and courts will not interfere with the judgment simply because it may have been erroneously entered, unless, in addition thereto, it is made to appear that it is unjustly burdensome to the moving party. In such a proceeding pure technicalities can have little influence upon the

decision of the court, if the judgment sought to be vacated is not of such a nature that, if it were set aside, the moving party would be able to interpose a substantial defense upon a new trial, or in another proceeding involving the same cause of action."

This is not only the rule in this state, but it is the general rule under statutes similar to our statute, Rem. Code, § 469.

"The applicant must show that he has a valid and meritorious defense to the action; and this must be made to appear, not by a mere averment that he has such a defense, but by setting forth fully the facts which constitute the proposed defense. And in some of the states, it is provided by statute that a judgment shall not be vacated until it is adjudged that there is a valid defense to the action, or, if the plaintiff seeks its vacation, that there is a valid cause of action. Where this provision is in force, it is error for the court to render a judgment of vacation before it has adjudged that there is a valid defense." Black, Judgments (2d ed.), § 346a.

The court, therefore, should have taken testimony to determine whether there exists substantial evidence to sustain *prima facie* the allegations of the petition, and thereon either vacate or refuse to vacate the judgment; and, if the judgment is vacated, to try out and determine the priority of these mortgages.

The order appealed from is reversed, and the cause remanded for further proceedings.

ELLIS, C. J., FULLERTON, HOLCOMB, and PARKER, JJ., concur.

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[No. 14007. Department Two. July 21, 1917.]

WILLIAM VIRGES, *as Trustee, Respondent*, v. GREGORY  
COMPANY, INCORPORATED, *Appellant*.<sup>1</sup>

**MORTGAGES—FORECLOSURE—SALE—TITLE OF PURCHASER DURING REDEMPTION PERIOD—RENTS—STATUTES.** A mortgage foreclosure sale does not, pending the period of redemption, terminate an unexpired lease, since it does not vest absolute title, in view of Rem. Code, § 600, providing that the purchaser, during the period of redemption, shall be entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation, accounting therefor in case of redemption, and § 601, providing that the court may restrain the commission of waste during such period, and § 602, providing that the purchaser shall be entitled to possession until redemption, unless the property is in the possession of a tenant holding under an unexpired lease, and entitled to receive the rents from such tenant; otherwise the lease might be prematurely terminated to the detriment of the mortgagor making redemption.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered November 13, 1916, upon findings in favor of the plaintiff, in an action for rent, tried to the court. Affirmed.

*C. M. Riddell and Jno. A. Shackelford*, for appellant.

*Burkey, O'Brien & Burkey*, for respondent.

PARKER, J.—This is an action wherein the plaintiff, Virges, as trustee, the purchaser of real property at a mortgage foreclosure sale, seeks recovery of rent from defendant, the E. F. Gregory Company, Inc., the tenant of the property during the redemption period following the sale, basing his right of recovery upon the terms of the lease under which E. F. Gregory Company, Inc., was in possession of the property as tenant at the time of the sale and which by its terms would not expire until long after the expiration of the redemption period. The controlling question presented for our consideration is whether or not the foreclosure decree, and

<sup>1</sup>Reported in 166 Pac. 610.

the sale had in pursuance thereof, put an end to the tenancy of the E. F. Gregory Company, Inc., under its lease at the time of the sale, and as to whether or not Virges, as purchaser at the sale, can enforce payment of rent from E. F. Gregory Company, Inc., under the terms of the lease during the redemption period.

The controlling facts are not in dispute, and may be summarized as follows: The property involved is a suite of office rooms in the National Realty Company's building in Tacoma. On December 25, 1911, the National Realty Company executed and delivered to Hans Pederson a mortgage upon lots 9 and 10, block 1103, Tacoma, and its building thereon situated, being the building here in question, to secure an indebtedness of \$100,000 owing to him by that company, which mortgage was duly recorded in the office of the auditor of Pierce county on the following day. This mortgage was thereafter duly assigned by Pederson to the E. I. DuPont DeNemours Powder Company.

On April 1, 1913, the National Realty Company and E. F. Gregory Company, Inc., entered into a written lease contract by which the realty company demised and let to E. F. Gregory Company, Inc., the suite of offices here in question for the term of ten years, at a monthly rental of \$150 per month for the first five years and at \$165 per month for the remaining five years, the E. F. Gregory Company, Inc., agreeing to pay such rent. This lease contract was duly executed by both parties by signing and acknowledging the same. It was never recorded in the auditor's office of Pierce county. It has remained in full force and effect at all times since its execution, unless it be held that the tenancy thereunder was terminated by the foreclosure proceedings hereinafter noticed, either at the time of the sale thereunder or at the expiration of the redemption period following such sale.

On June 1, 1914, the National Realty Company executed and delivered to the plaintiff, Virges, as trustee, a mortgage upon these same lots and the building thereon situated to se-

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cure an indebtedness of \$20,000 owing to him from that company, which mortgage was duly recorded in the office of the auditor of Pierce county on the same day. On March 30, 1915, the powder company commenced an action in the superior court for Pierce county seeking foreclosure of the mortgage which had been assigned to it by Pederson, making Virges, whose subsequent mortgage had been recorded, a defendant. Notice of the pendency of that action was duly filed in the office of the auditor of Pierce county on the day of its commencement. E. F. Gregory Company, Inc., was not made a defendant in that action, unless it in effect became such and would be bound by the decree to be rendered therein by reason of the fact that its lease was executed subsequent to the powder company's mortgage and was not recorded in the office of the auditor of Pierce county. Virges filed his answer and cross-complaint in that action seeking foreclosure of his mortgage, claiming that it was in fact a superior lien to that of the powder company's mortgage because of an agreement entered into between Pederson and the National Realty Company, of which the powder company had notice when it acquired the mortgage.

On February 15, 1916, a decree was entered in that action foreclosing both the powder company's and Virges' mortgages, decreeing Virges' mortgage to be a superior lien to that of the powder company's mortgage, though subsequently executed, ordering the sale of the lots and the building thereon and the application of the proceeds thereof, first, to the payment of the costs of the action, including the expenses of the receiver incurred incident to the foreclosure, second, to the payment of the amount decreed due upon Virges' mortgage, and third, to the payment of the amount decreed to be due upon the powder company's mortgage. Execution was duly issued and sale of the property made on July 1, 1916, Virges becoming the purchaser of the whole of the property for the sum of \$45,083, which proved to be only sufficient to pay the costs of the action, the expenses of the receivership incident

thereto and the amount then due upon Virges' mortgage, leaving the amount due upon the powder company's mortgage wholly unpaid. Thereupon a certificate of sale was duly issued to Virges, entitling him to a deed for the property at the expiration of one year thereafter under Rem. Code, § 603, if no redemption be made in the meantime. If any explanation is here needed showing the cause of the property's selling for such a small sum, it is found in the fact that there was a mortgage upon the property to secure an indebtedness of \$375,000 which was prior and superior to the mortgages of Virges and the powder company, the sale under the foreclosure necessarily being made subject to that mortgage.

The E. F. Gregory Company, Inc., had paid rent under its lease up to July 1, 1916, the date of the foreclosure sale made to Virges. Proceeding upon the theory that its tenancy was terminated on that date by virtue of the foreclosure sale, the E. F. Gregory Company, Inc., refused to pay rent to Virges as stipulated in the lease, but offered to pay a lesser amount which it claimed was a reasonable rental value of the offices it was occupying and had theretofore occupied under the lease. In September, 1916, Virges commenced this action seeking recovery of rent from the E. F. Gregory Company, Inc., for the months of July and August, 1916, at the rate of \$150 per month, resting his right of recovery upon the terms of the lease under which the E. F. Gregory Company, Inc., had, prior to the sale, been holding, which had not by its terms then expired and which Virges insists continued in full force and effect, at least until the expiration of the redemption period, and that he, as purchaser at the foreclosure sale, became entitled to rent from E. F. Gregory Company, Inc., in pursuance of the terms of the lease, under the provisions of Rem. Code, §§ 600 and 602. Trial in the superior court upon the merits without a jury resulted in judgment in favor of Virges and against E. F. Gregory Company, Inc., as prayed for, from which it has appealed to this court.

It is contended in appellant's behalf that the decree fore-



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closing the powder company's mortgage, and the sale made thereunder, had the effect of terminating appellant's tenancy under the lease. This contention is rested upon the theory that appellant was, in effect, a party to that action and became bound by the decree rendered therein under the provisions of Rem. Code, § 243, relating to the notice of pendency of actions, its lease being subsequent and inferior to the powder company's mortgage and not recorded prior to the filing of the notice of the pendency of the action. We shall assume that the decree has the effect of terminating appellant's tenancy under its lease upon the expiration of the redemption period, if there be no redemption in the meantime, because of the complete divesting of the realty company of its title at that time when respondent, as purchaser at the foreclosure sale, would be entitled to a deed. We leave this question undecided here, however, since it becomes unnecessary to here decide it, in view of our conclusion that respondent's rights under his certificate of purchase during the redemption period are not those of an absolute owner, but subject to the right of appellant to remain in possession upon payment to him of the rent specified in the lease. The realty company's right of redemption, appellant's right of possession under the lease, and the limitation upon respondent's right of possession and use of the property during the redemption period, are prescribed by the following provisions of Rem. Code:

"§ 600. The purchaser, from the time of the sale until the redemption, and the redemptioner from the time of his redemption until another redemption, except as hereinafter provided, is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by such person or persons thus entitled thereto, from the property thus sold, preceding the redemption thereof from him, the amount of such rents and profits, over and above the expenses paid for operating, caring for, protecting and insuring the property, shall be a credit upon the redemption money to be paid; . . .

"§ 601. Until the expiration of the time allowed for redemption the court may restrain the commission of waste on the property. . . .

"§ 602. The purchaser from the day of sale until a resale or redemption, and the redemptioner from the day of his redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same be in the possession of a tenant holding under an unexpired lease, and in such case shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the period of redemption. . . ."

Other portions of these sections are not material to our present inquiry.

It seems plain to us that, whatever our conclusion might be touching the termination of appellant's tenancy under the lease upon the complete vesting of the title of the property in respondent at the expiration of the redemption period, appellant's tenancy was not terminated so as to divest it of the right to continue in possession under its lease, or absolve it from the obligation to pay rent as therein agreed, by the mere sale of the property to respondent under the foreclosure decree on July 1, 1916. Nothing could seem plainer than that respondent's rights during the redemption period were not those of an absolute owner, as they ordinarily would be following the sale in the absence of a redemption statute. He was not entitled to possession as against appellant, it being "a tenant holding under an unexpired lease." True, he was entitled to collect the rent due from appellant under the lease, but he was also bound to account for the rent so collected to the owner, the realty company, if redemption be made within the year prescribed therefor. Manifestly he would collect such rent not only for himself, but also, in a sense, as trustee for the realty company during the redemption period, and be subject to account therefor as the statute prescribes, if redemption be made. He might, also, be restrained by the court from "the commission of waste on the property" during the redemption period. These considerations, it seems to us,

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all but conclusively argue that the tenancy of appellant under its lease was not terminated by the mere sale of the property to respondent on July 1, 1916. It follows that appellant, as tenant under the unexpired lease, could in no event be evicted by respondent under any different circumstances than it could be by the realty company until respondent's title was perfected by deed at the expiration of the redemption period. If this were not so, and the tenancy was terminated by the mere sale at the commencement of the redemption period, and the realty company should redeem within that period, it would find the tenancy terminated years before the expiration of the lease, though title to the property had never passed out of him. It seems to us that these redemption statutory provisions preserve a tenancy such as is here involved, at least until the purchaser at an execution sale may, by virtue of his title paramount, acquired at the end of the redemption period, be enabled to evict the tenant.

The decisions of this court in *Hardy v. Herriott*, 11 Wash. 460, 39 Pac. 958, and *Knipe v. Austin*, 13 Wash. 189, 43 Pac. 25, 44 Pac. 531, may, if read superficially, seem out of harmony with this conclusion, but they are plainly not so when read in the light of the redemption statute there under consideration, which statute, as was there held, gave the purchaser at an execution sale the absolute right to collect and retain the rents and profits of the property during redemption period without any obligation to account therefor to the owner upon redemption being made. But even under that redemption statute, the decisions of this court hold, in effect, that the purchaser's title did not become absolute until the expiration of the period of redemption. *Hays v. Merchants' Bank of Port Townsend*, 10 Wash. 573, 39 Pac. 98; *Hays v. Merchants' Nat. Bank of Port Townsend*, 14 Wash. 192, 44 Pac. 137; *Carroll v. Hill Tract Improvement Co.*, 44 Wash. 569, 87 Pac. 835. The above quoted provisions of our present redemption statute were not adopted until 1899; the decisions above cited dealing with the rights of purchasers at

execution sales under the prior statute. Laws of 1899, pages 92 and 93.

In 2 Tiffany, Landlord and Tenant, at page 1297, that learned author observes:

“The paramount title to which the tenant yields must involve a present right of possession in the person asserting it, and there is no eviction if the tenant yields possession to one having a right to possession merely at some future day. Accordingly, it has been decided that a tenant yielding possession on demand to a purchaser at foreclosure sale, before the latter had received his deed or the sale to him had been confirmed, could not claim to have been evicted.”

It would seem to follow from this view of the law, which we deem sound, that the right or title acquired by respondent by his purchase at the foreclosure sale on July 1, 1916, in no event became paramount to the right of appellant under its lease during the redemption period and that, therefore, appellant would not have been required to yield possession to respondent during that period. And it having the right to so retain possession under the lease as against respondent, it would seem to follow, as a matter of course, that respondent's right to collect rent stipulated in the lease was equally secure during that period. There then is mutuality of obligation binding both respondent and appellant, as, prior to the sale, the realty company and appellant were bound by the terms of the lease. But one case has come to our notice which seems to be exactly parallel in principle with that here involved, and that is the case of *Whithed v. St. Anthony & D. Elevator Co.*, 9 N. D. 224, 83 N. W. 238, 81 Am. St. 562, 50 L. R. A. 254, where it was held, in substance, that the right of the purchaser at a foreclosure sale during the redemption period was the same as that of the owner as against the tenant holding under the lease. In other words, that the purchaser could recover rent as specified in the lease—in that case, rent in kind—during the redemption period as though he were the lessor, upon the theory that the tenancy was not

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terminated by the mere sale and in no event would be terminated until the expiration of the redemption period. The statute there involved, so far as quoted in the court's opinion, is in the exact language of a portion of Rem. Code, § 600. The above quotations from our statutes lend additional support to the conclusion we here reach.

We are of the opinion that the judgment must be affirmed. It is so ordered.

ELLIS, C. J., MOUNT, FULLERTON, and HOLCOMB, JJ., concur.

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[No. 14095. Department Two. July 21, 1917.]

E. W. RHODES, *Appellant*, v. THE CITY OF TACOMA,  
*Respondent*.<sup>1</sup>

MUNICIPAL CORPORATIONS—OFFICERS—ORDINANCES — CONSTRUCTION. The "manager" of a sub-department of the light department of a city, provided for by ordinance, who was to be nominated by a commissioner and confirmed by the council, is an "officer" of the city within charter provisions classifying all persons in the service of the city and providing for a class of appointive officers to be so nominated and confirmed and to include named officers and "such other chiefs or superintendents of departments as the council shall by ordinance . . . create or establish."

CONTRACTS—PUBLIC POLICY—OFFICERS—SALARY. An agreement by an officer before appointment to accept a less salary than that fixed by law is void as against public policy.

MUNICIPAL CORPORATIONS—OFFICERS—SALARY—RIGHT TO — ACCEPTANCE. Where an officer's salary is fixed by ordinance, which could be repealed or suspended only by ordinance, he is entitled to recover the full salary, notwithstanding the officer appointing him informed him that he would receive a less salary, and for a period of over two years he accepted monthly salary warrants acknowledging payment in full for services rendered.

ACCORD AND SATISFACTION—CONSIDERATION—ACCEPTANCE OF LESS SUM—OFFICER'S SALARY. Where a salary is fixed by law, acknowl-

<sup>1</sup>Reported in 166 Pac. 647.

edgment of a less sum in full payment for all services rendered is not an accord and satisfaction, since there was no consideration, and no question of contract or public policy is involved.

**INTEREST—OFFICER'S SALARY—DAMAGES.** Where a salary is fixed by law, the officer cannot recover interest on back salary retained from monthly payments, prior to the commencement of action therefor, as the same is recoverable only as damages.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered January 3, 1917, upon findings in favor of the defendant, in an action for salary, tried to the court. Reversed.

*T. L. Stiles*, for appellant.

*U. E. Harmon* and *Frank M. Carnahan*, for respondent.

**PARKER, J.**—The plaintiff, E. W. Rhodes, seeks recovery of a balance of salary claimed to be due him from the defendant city for services rendered as manager of the commercial department of the light department of the city. Trial in the superior court without a jury resulted in findings and judgment against the plaintiff, denying to him the relief prayed for, from which he has appealed to this court.

The controlling facts are not in dispute, and may be summarized as follows: At all times here in question, there was in force a duly enacted general ordinance of the city which, so far as we are here concerned with its provisions, reads as follows:

“Section 1. That there be in the Light Department of the city, a sub-department to be known as the Commercial Department, the purpose of which shall be the acquisition of electrical business for the city power plant, and furthering the other business of said plant from time to time as may be convenient or necessary.

“Section 2. There shall be a manager of the Commercial Department who shall be nominated by the commissioner of light and water [and] confirmed by the council before receiving his commission. The salary of the manager shall be \$200 per month. . . .” Ordinance No. 5,261.

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For sometime prior to May 21, 1914, the position created by this ordinance had remained vacant. On that day, the commissioner of light and water appointed the appellant to that position. This was done in pursuance of a resolution of the city council adopted the day previous, wherein the commissioner was authorized to "appoint" a manager of the commercial department. Manifestly the word "appoint" in the resolutions was used in the sense of "nominate." Thereupon the appointment being confirmed by the city council, as required by the ordinance and the city charter, a commission was issued to appellant by the mayor on May 27, 1914, authorizing him to perform the duties pertaining to the position. Appellant immediately entered upon his duties under this appointment and continued to perform the same until October 15, 1916, when he was discharged. During the time appellant occupied the position and performed the duties thereof from May 27, 1914, to October 15, 1916, there was paid to him upon his salary from month to month, on the usual day for paying city officers and employees, sums equalling \$150 per month. The commissioner of light and water, at the time of appointing appellant, told him, in substance, that the city probably would pay him only \$150 per month, though it might pay him more later. This thought on the part of the commissioner seems to have been prompted by the then condition of the business of the light department and the probable increase in that business in the future. Appellant knew of the existence of the ordinance creating the position and fixing the salary thereof at \$200 per month. We think it is clear that he did not, at the time of his appointment or at any time prior thereto, agree with any agent of the city to accept \$150 per month in full payment of his salary. If he is to be precluded from recovering the additional \$50 per month for which he now seeks recovery, it is only because of what he did after his appointment in the way of accepting the \$150 per month paid him by the city. All he did in this respect was to receive warrants from the city controller on

each pay day and thereafter present the same to the city treasurer and receive money therefor, he at the time indorsing the warrants on the back to evidence their payment. On the back of the warrants so received by appellant after February 1, 1915, there were printed words reading in part as follows:

"All endorsements on this check are an acknowledgment of payment in full for services rendered to the city of Tacoma as per roll, line and month on the reverse side hereof,"

under which appellant's indorsements of the warrants were made when receiving payment from the city treasurer. The indorsements made by him on warrants received by him prior to that time were made in blank.

It is contended in appellant's behalf that the position to which he was appointed and the duties of which he performed was an office in the sense that the salary attached thereto is not a matter of contract and that, therefore, he is not precluded by the acceptance of the \$150 per month from recovery of the \$50 per month remaining due him upon the salary fixed by the ordinance, which was in full force during all the time he was the incumbent of the office. As to what positions under the city government are offices, and as to the manner of fixing the salaries of such positions, we think is rendered quite plain by the terms of the following provisions of the city charter:

"Sec. 10. All persons in the service of the city shall be classified as follows: Class A. Elective officers, embracing a mayor, four councilmen and controller, each of whom shall be elected at large by the qualified electors of the city. Class B. Appointive officers, embracing city clerk, city attorney, city engineer, chief of police, a fire chief, and such other chiefs or superintendents of departments as the council shall, by ordinance passed in the manner provided in this charter, create or establish.

"Sec. 21. Except as herein otherwise provided, the council shall by ordinance fix the compensation of all salaried officers, clerks, assistants and employees, and until such compensation has been fixed by ordinance as aforesaid, the same shall remain as now provided.



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“Sec. 24. Upon the appointment by the commissioner of the appropriate department, and confirmation by the council, the mayor shall commission all other appointive officers as in this article defined.

“Sec. 41. The council shall, consistent with the provisions of this charter, create any office, position or employment that may in its opinion be necessary or expedient, and fix the salary and duties thereof. It may at any time abolish the same, whereupon the salary attached thereto shall cease.

“Sec. 45. The fixing of salaries of appointive officers and employees shall be by ordinance, and at least four votes shall be required for the passage of such ordinance.”

The language of these charter provisions, we think, leaves little room for argument that the position occupied by appellant was other than that of an office within the strict meaning of that term. True, it was not called an office in the ordinance creating it, but it corresponds as completely with those positions designated as “appointive offices” in class B of section 10, above quoted, as if it had been called an “office” in the ordinance. The ordinance provides that the position be filled by nomination, confirmation by the council, and the issuance of a commission by the mayor exactly as the charter provides those positions designated in class B as “offices” shall be filled.

We note in this connection that subdivision g of section 38 of the charter reads as follows:

“No ordinance or section thereof shall be revised or amended except by ordinance adopted in the manner provided in this charter appropriate to the subject-matter of the ordinance so amended or revised, which new ordinance shall contain the entire ordinance or section as amended; and shall repeal the ordinance or section so amended; nor shall the council by resolution or motion exempt any person or corporation from any provisions or requirements of any ordinance, nor suspend any ordinance or portion thereof except by another ordinance repealing the same, and no ordinance or section thereof shall be repealed except by ordinance adopted in the manner provided in this charter.”

Thus it is rendered plain that no agency of the city has any authority whatever, other than the city council, to suspend the force and effect of an ordinance, and even the city council cannot do so other than by the passage of another ordinance. It seems quite plain to us that appellant was at all times in question an incumbent of an office of the city created by ordinance, which also fixed the salary of the office and which it is not pretended was ever authoritatively repealed or modified in any respect.

It is well settled law that an officer's right to his salary which is fixed by law or in a manner prescribed by law does not rest upon any contractual relation existing between him and the municipality or the state under which he holds the office. *Bartholomew v. Springdale*, 91 Wash. 408, 156 Pac. 1090. It seems equally well settled that any contract or agreement on the part of an incumbent of an office, made at the time of or before his appointment to the office, that he shall accept in lieu of the salary prescribed by law a sum less than is so prescribed is void as against public policy and does not become binding upon him so as to preclude him from recovering the full amount of the salary. *Miller v. United States*, 103 Fed. 413; *Glavey v. United States*, 182 U. S. 595; *Lukens v. Nye*, 156 Cal. 498, 105 Pac. 593, 36 L. R. A. (N. S.) 244, and note. So, even should it be considered that there was a contract or understanding between appellant and certain officers of the city, other than with the city council evidenced by ordinance, appellant would not be estopped from claiming the full amount of the salary prescribed by this ordinance.

Is appellant precluded from now asserting his claim for the unpaid portion of his salary because of his indorsements upon the salary warrants under the above quoted language found on the back thereof, which counsel for the city contends amounts to a full accord and satisfaction on the part of appellant. Now since we have seen that appellant's right to the salary of the office he occupied does not rest upon any

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contractual relation existing between him and the city, and the salary of his office is fixed and certain in amount, there being no dispute as to the time he was an incumbent of the office, it would seem that any such alleged accord and satisfaction would be without consideration. True the city paid him \$150 monthly, but its obligation so to do was absolute. It thereby paid him no more than it was at all events bound in law to pay him. So it is easy to see that it gave him nothing in consideration of any accord and satisfaction.

In the text of 1 C. J. at page 543, we read:

“In the absence of statute providing otherwise the rule is settled, except in two states, that the giving of a receipt in full does not in any way affect the rule that payment of a less sum in discharge of a greater sum presently due is not a satisfaction thereof, although accepted as such, as the element of consideration is lacking, and it is immaterial that the receipt was given with knowledge of the facts and that there was no error or fraud.”

This view of the law seems to be amply supported by authority. Among the numerous cases so holding wherein the question seems well considered, we note: *Nixon v. Kiddy*, 66 W. Va. 355, 66 S. E. 500, and *Chicago, M. & St. P. R. Co. v. Clark*, 92 Fed. 968. See, also, note to *Fuller v. Kemp*, 20 L. R. A. 785. In *Adams v. United States*, 20 Ct. of Claims 115, it was held that a receipt given to the disbursing officer of the government by a customs inspector for money as compensation for services purporting to be “in full compensation for the period above stated,” having reference to his salary, did not preclude the officer from making further claim for the balance of salary due him measured by the law fixing the same. So disposing of the question Judge Schofield, speaking for the court, said:

“The court has found (finding III) that the claimant during all his terms of service performed the duties of an inspector, and he is therefore entitled to an inspector’s pay.

“Monthly vouchers were drawn up, reciting the number of days the claimant was employed during the month and the

amount of compensation allowed by the collector and secretary, ending with a receipt 'in full for compensation for the period above stated,' which the claimant signed.

"We do not think he thereby relinquished his right to claim the further compensation allowed by law. If the appointing officer has no power to change the compensation of an inspector, certainly the paying officer has not. He had no right to exact such a receipt and the claimant lost nothing by signing it. (*Fisher's Case*, 15 C. Cls. R. 323; *Bostwick v. United States*, 94 U. S. R. 53.)"

In *Pitt v. Board of Education of New York*, 216 N. Y. 304, 110 N. E. 612, the court of appeals adopted this view, placing it upon the theory that such an accord and satisfaction in order to become effective must be supported by a consideration, and that there would be want of consideration therefor if nothing more were shown than that the officer merely receipted in full for his salary when he in fact received only a portion of that prescribed by law.

Counsel for respondent city rely particularly upon the decisions in *O'Hara v. Town of Park River*, 1 N. D. 279, 47 N. W. 380, and *De Boest v. Gambell*, 35 Ore. 368, 58 Pac. 72, 353, which cases come nearest supporting their position of any cited and which are the only cited cases which can be construed as lending any support to respondent's position. The *O'Hara* case was one in which the officer rendered his bill for services, demanding of the town compensation in a less sum than he was in law entitled to. He was paid accordingly, and the court held that because of his claim so made and the acceptance of payment thereof, he was estopped to claim further compensation for the time covered by his claim. Whether or not the statute of North Dakota relative to municipal corporations required an officer to present his claim for salary before receiving pay therefor does not appear. But if such be the case, we think there is room for distinguishing that case from the one before us. In this case there was no claim for the salary in pursuance of any

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rule or law requiring the same, but only a receiving of payment by appellant as tendered to him by the city from time to time. In the *De Boest* case, the supreme court of Oregon recognized the doctrine that contracts made by officers touching their salary which is fixed by law, prior to their appointment, are void as against public policy; but held that, when a contract was so made and thereafter in pursuance of such a contract the officer accepted payment, it thereby became an executed contract and he was estopped from making further claim for any additional compensation that might have been due him under the law covering the period for which he so received payment. With all due respect to those learned courts we think, if their decisions cannot be distinguished from the case before us, they should not be held controlling upon us here, in view of the law as enunciated in the authorities above noticed by us. We are of the opinion that appellant is entitled to recover from the city the unpaid balance of \$50 per month due him for the entire period during which he occupied the office of manager of the commercial department of the light department of the city.

Contention is made in appellant's behalf that he was entitled to recover from the city interest to be computed upon the balance due him for each of the months he was the incumbent of the office, from the time the same became due him, to wit, at the end of each month. If his right to recover the salary rested upon contract, there would possibly be merit in this contention. But since it does not rest upon contract and his right to interest has no other foundation than that of any other claim of damages, we think he is not entitled to recover interest except from the time of the commencement of this action. In 22 Cyc. 1485 the rule seems to be correctly stated as follows:

"Where interest is claimed as damages, and not by reason of any contract therefor, it will not be allowed if the delay in the payment of the principal debt is the result of the neglect of the creditor to demand and enforce such payment."

In harmony with this rule, the supreme court of Wisconsin in *O'Herrin v. Milwaukee County*, 67 Wis. 142, 30 N. W. 239, held that, while a public officer could recover from the county the unpaid portion of his salary, though he had been paid and had accepted periodically a less amount than the law prescribed, he could not recover interest upon the periodical balances due him. In concluding the opinion so holding Justice Cassoday, speaking for the court, said:

"The mere fact that the plaintiff accepted the \$500 a year without protest or exacting more at the time, did not take away his right to the balance. We do not think, however, that the plaintiff is entitled to any interest on any unpaid balance. He was a public officer, under a salary. His neglect to draw his salary was his own matter. If payment was refused, he had his remedy. It would be against public policy to hold that an officer failing to draw his salary is entitled to interest thereon."

In *Bartholomew v. Springdale*, 91 Wash. 408, 156 Pac. 1090, we in effect reached this conclusion, though the question was not there seriously considered in the light of authority.

We conclude that the judgment of the trial court must be reversed, and the cause remanded with directions to enter judgment in favor of appellant and against respondent city for the balance of the \$50 per month due appellant for the full period he was the incumbent of the office, with interest on the whole sum due from the date of the commencement of this action in the superior court. It is so ordered.

ELLIS, C. J., HOLCOMB, and MOUNT, JJ., concur.

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[No. 14128. Department Two. July 21, 1917.]

THE CITY OF SEATTLE, *Respondent*, v. W. H. SMYTHE,  
*Appellant*.<sup>1</sup>

**THEATERS AND SHOWS—REGULATION—ORDINANCE—CONSTRUCTION—OFFENSES—OFFENSIVE PICTURES—APPROVAL.** In a prosecution for violating a city ordinance that positively prohibited the display of offensive picture films of a described sort, the approval of the advisory committee is no defense, where by the ordinance the committee was to assist in the enforcement of the ordinance, which provided that a film must be displayed to the committee upon demand and that no film shall be displayed after examination unless approved, there being no power to approve prohibited films (PARKER, J., dissenting).

**SAME—REGULATION—OFFENSES—GOOD FAITH.** Good faith is no defense to a prosecution for the violation of an ordinance prohibiting the display of offensive pictures, as intent is conclusively presumed from the act.

**CRIMINAL LAW—EVIDENCE—ADMISSIBILITY.** Upon a prosecution for violation of an ordinance regulating picture shows, evidence of a conversation showing that defendant was the person who exhibited, and which also showed evil intent, does not open the door to evidence in rebuttal showing absence of knowledge and intent; the defendant's remedy being by motion to strike.

**SAME—TRIAL—INSTRUCTIONS.** Where an instruction correctly stated the law and issues, the fact that it contained unnecessary verbiage is not error.

Appeal from a judgment of the superior court for King county, Smith, J., entered January 6, 1917, upon a trial and conviction of violating an ordinance regulating moving picture shows. Affirmed.

*Morris & Shipley* and *Paul S. Dubuar*, for appellant.

*Hugh M. Caldwell* and *Thomas J. L. Kennedy*, for respondent.

**FULLERTON, J.**—The city of Seattle enacted an ordinance regulating and governing places of amusement at which moving or motion pictures are displayed or exhibited.

<sup>1</sup>Reported in 166 Pac. 1150.

Section 1 of the ordinance makes it unlawful for any person, firm or corporation to

“exhibit, display or produce, or cause to be or permit to be exhibited, displayed or produced, in any building or place in the city of Seattle, any drama, play, theatrical, stage or platform performance, or any picture, of an obscene, indecent or immoral nature, or wherein any scene of violence is shown or presented in a gruesome manner or detail or in a revolting manner, or which tends to corrupt morals, or which is offensive to the moral sense, . . .”

Section 2 creates an advisory committee the membership of which is appointed by the mayor, making it their duty to aid in the prevention of violations of the ordinance, and for that purpose to discover violations and report the same to the mayor.

Section 3 reads as follows:

“Every person, firm or corporation engaged in supplying or furnishing for display in the city any film or moving picture shall, upon demand of said advisory committee, display to such committee any films intended to be exhibited in the city, and no film shall be shown or displayed in any moving picture theater after such examination unless the same shall have been approved by the advisory committee of the city, and no film exchange shall release for exhibition, and no exhibitor shall knowingly exhibit or display in any moving picture theater any film which has not been approved by the National Board of Censorship or by the advisory committee of the City of Seattle.” Ordinance No. 37,490.

On July 25, 1916, a criminal complaint was filed before the police judge of the city of Seattle charging the appellant Smythe with a violation of the ordinance. The complaint set forth that the appellant on a day named “did wilfully and unlawfully exhibit, display,” etc., in a certain building within the city of Seattle, a certain picture of an obscene and immoral nature, and in which a scene of violence was shown and presented in a gruesome manner. The appellant was arrested on a warrant issued on the complaint, and entered a plea of not guilty to the charge, and on a trial before the



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police judge was convicted. From the judgment of conviction, he appealed to the superior court of King county, where he was tried by the court sitting with a jury and again convicted. This appeal is from the last mentioned judgment.

At the trial of the cause, the appellant sought to show that, prior to displaying the picture to the public, he displayed it to a majority of the members of the advisory committee, appointed under the ordinance mentioned, and that its exhibition was not forbidden by them, and sought to show by the appellant himself that he exhibited it in good faith, believing it to be such a picture as might lawfully be shown under the provisions of the ordinance. The court rejected this proffered evidence on the ground of immateriality, ruling that it constituted no defense to a display of the picture to the public to show that it received the approval of the advisory committee or that the appellant acted in good faith in displaying it, if the picture was in fact of the character prohibited by the ordinance.

The appellant assigns error upon this ruling, contending that, by the terms of the ordinance, the approval of the picture by the board of advisors prior to its public display protects the person displaying it against a prosecution under the ordinance. It is doubtless true that the city could enact an ordinance regulating the display or exhibition of picture films in which a board of censors is created and in which the judgment of the board is made conclusive of the guilt or innocence of a person charged with violating the ordinance; and this, without regard to the question how far the display of the film might violate the general statutes or the general moral sense. But we cannot think this ordinance goes thus far. The first section, it will be observed, contains a positive prohibition against the exhibition or display of a picture film of a described sort. The second section creates an advisory committee to assist in the enforcement of the provisions of the ordinance and imposes upon them certain duties; while the

third section confers upon the board certain powers to enable them better to perform their duties. It is true, the third section also prohibits the display of a picture film which has been exhibited to the advisory committee and has not received their approval, and prohibits the exhibition or display of a film which has not received the approval of the advisory committee or the National Board of Censors; but it nowhere declares, either expressly or by implication, that the approval of the board of advisors will justify the exhibition or display of a picture film if it is of the prohibited sort. By the terms of the ordinance, the board is but an aid to the enforcement of the statute; it was not created, nor is it given power, to determine the guilt or innocence of a person charged with its violation.

From the foregoing, it must follow that the court ruled without error in excluding the proffered evidence. Since the board of supervisors were without power under the ordinance to determine whether the picture film was one proper to be exhibited or displayed, their approval could not be shown in exoneration of its exhibition. Nor was their approval of the film or the good faith of the appellant proper to be shown on the question of intent. This offense belongs to that class of offenses in which the intent to violate the law is conclusively presumed from the fact of violation. It is a police regulation enacted for the protection of the public morals, and the penalty is imposed without regard to any wrongful intent. *State v. Nicolls*, 61 Wash. 142, 112 Pac. 269, Ann. Cas. 1912B 1088; *State v. Burman*, 71 Wash. 199, 128 Pac. 218; *State v. Cherry Point Fish Co.*, 72 Wash. 420, 130 Pac. 499; *State v. Case*, 88 Wash. 664, 153 Pac. 1070.

The appellant further contends in this connection that the rejected evidence was admissible because of the word "wilfully" used in the information in charging the offense, arguing that the use of this word enlarged the issues making the intent with which the prohibited act was done a material

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inquiry. But we cannot accept this conclusion. The unlawful doing of the act constitutes the offense, and the intent is presumed from the proofs of the unlawful doing. The offense is neither enlarged nor diminished by the words used in describing it. The word "wilfully" was unnecessary and was probably surplusage, but its use cast no additional burden upon the city. *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810.

On the examination of the witness Gill by the city's counsel, the following occurred:

"Mr. Kennedy: Now I will ask you if you had at any time either before or since any conversation with the defendant relative to that play being run by or with his consent? A. Yes; I talked with Mr. Smythe after the transaction. Q. What did he say about it? A. Well, it came up for discussion as to how the picture had come to be passed by the Board, and why I stopped it, and he stated to me that he had given the Board an early view of the picture because he was a little afraid of it and didn't want to advertise it until he knew the picture would pass the Board. It came up in connection with some trouble over one member of the Board who had told me—Mr. Morris: One minute: We object to any statement that any one made to you. Mr. Kennedy: No. Just in so far as his statement constitutes an admission that he was the one that was running the picture, is all I want. A. (continuing) He told me that he had had an early view of the picture because he did not want to advertise it until he knew that it would pass."

Of this, the appellant's counsel say in their brief:

"This testimony was material as tending to show that appellant had guilty knowledge of the improper character of the film and an evil intent in showing it. . . . The respondent having thus presented evidence tending to show guilty knowledge and an evil intent on the part of appellant, appellant, in common fairness, and as a matter of absolute right, should have been permitted to show an absence of such knowledge and intent. He was only seeking to contradict with similar evidence the evidence which the respondent had introduced. It is a well settled law that when one side opens the door to a certain line of evidence, then the other side has a right to introduce similar testimony."

This contention is not, in our opinion, tenable. It was incumbent upon the city to show, in substantiation of its case, that a picture film of the proscribed class had been exhibited and that the appellant was the person who exhibited it. As we read this part of the record, it was simply an effort to show the latter of these facts. The witness may in his answer have gone beyond the purport of the question and detailed matters of which no inquiry was made, but, if this be so, it did not open up the issues for testimony of like kind on the part of the appellant. The remedy was a motion to strike.

The court, in the course of its instructions, gave the following:

“Boards of censorship are established to aid in enforcing the law, not to substitute their moral judgment for that of the public or the law makers. They have no power, either collectively, or separately, as individuals, to grant permission to any one to violate the law; and if you find beyond a reasonable doubt that the picture . . . is of an obscene, or indecent, or immoral nature, or that said picture shows or presents a scene of violence in a gruesome manner or detail or in a revolting manner; then and in that event you will utterly disregard any and all evidence concerning the passing of said picture by any board or boards of censors.”

It is objected that the language used in the instruction contains an inference that the appellant had violated the ordinance; and, further, that it goes “beyond the evidence, the law and the issues in the case and is clearly error.” But we do not so view it. It may contain some unnecessary verbiage, but it is not a misstatement of the law. The jury were correctly instructed as to the issues to be determined by them, and there is nothing in the instruction complained of that would tend to mislead them.

The judgment is affirmed.

ELLIS, C. J., MOUNT, and HOLCOMB, JJ., concur.

PARKER, J. (dissenting)—I am not able to concur in the views expressed in the foregoing opinion. Assuming, for ar-

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gument's sake, that the ordinance in the form enacted is a valid exercise of police power on the part of the city, I think appellant had the right to show approval of the picture by the city's advisory committee; and that, if he could succeed in convincing the jury that the advisory committee had approved the picture, he would be entitled to acquittal. Instead of leaving the question of any given picture being obscene, indecent, or immoral wholly to be determined in court upon the prosecution of one accused of exhibiting such picture, the city, in the same ordinance in which it provides for punishing one for exhibiting obscene, indecent or immoral pictures, prescribes a method by which, through its advisory committee, it will assume to prejudge before exhibition whether or not a given picture is obscene, indecent or immoral, and in effect says to the one proposing to exhibit such picture: "You may exhibit it if approved by the committee and you shall not exhibit it if the committee decides otherwise." This ordinance, No. 37,490, to my mind must be viewed as a whole, and in prosecutions thereunder it should be remembered that sections 2 and 3 are as much a part of it as section 1. If it can be said that sections 2 and 3 are void in so far as they authorize the advisory committee to pass upon the question of a picture being obscene, indecent or immoral, then it must follow that the whole ordinance is void, in view of the relation of its several provisions. This is not a prosecution under the state law, but under *this ordinance*, and under this ordinance alone must the appellant be convicted or acquitted. If it is desired to institute and carry on prosecutions freed from the effect of sections 2 and 3 of this ordinance, let it be done under the state law. Section 2459, Rem. Code, seems to furnish ample opportunity for such prosecutions. I am of the opinion that appellant is at least entitled to a new trial.

[No. 14019. Department One. July 21, 1917.]

THE STATE OF WASHINGTON, *on the Relation of H. N. Martin,*  
*Plaintiff,* v. THE SUPERIOR COURT FOR GRANT COUNTY,  
*Respondent.*<sup>1</sup>

PROHIBITION—ADEQUATE REMEDY AT LAW—DENIAL OF CHANGE OF VENUE—JURISDICTION. Rem. Code, §§ 207-209, providing for a change of venue of a transitory action to the county of defendant's residence grants a right independent of the merits, the assertion of which, under undisputed facts, ousts the court of jurisdiction to hear and determine the cause; and the remedy by appeal, where the court denies the application on admitted facts and insists upon proceeding with the cause, is not adequate within the meaning of Rem. Code, §§ 1027, 1028, authorizing prohibition where a tribunal is acting without or in excess of jurisdiction, and there is no plain, speedy and adequate remedy at law.

VENUE—CHANGE—TRANSITORY ACTIONS. An action to cancel a mortgage given without consideration is a transitory one, and defendants, resident in L. county, are entitled to a change of venue, although the mortgaged lands were located in G. county where the action was brought.

Application filed in the supreme court February 27, 1917, for a writ of prohibition to restrain the superior court for Grant county, Hill, J., from trying a cause after denying a change of venue. Granted.

*Martin & Jesseph*, for relator.

*T. D. Cross* and *Thos. M. Vance*, for respondent.

CHADWICK, J.—On the 3d day of January, 1917, M. H. Sorrell and wife brought an action in the superior court of Grant county against H. N. Martin and Amanda V. Martin, his wife. It is alleged in the complaint that Sorrell and wife executed a mortgage upon certain real estate in Grant county to secure a promissory note due and payable to H. N. Martin; that the note and mortgage were given without any consideration, and praying that the court decree that the note and mortgage be surrendered for cancellation.

<sup>1</sup>Reported in 166 Pac. 630.

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Martin and wife are now, and have been for twenty-five years last past, residents of Lincoln county, Washington, and were served personally in that county. They appeared in the action by demurrer and motion to change the venue of the action from Grant county to Lincoln county. The motion to change the venue was accompanied by a sufficient affidavit of merit. The judge presiding in the court below overruled the motion for change of venue, holding that the action was a local action and, notwithstanding the residence of the defendants in another county, the case was triable in the place where the land is situated. Martin and wife then applied to this court for a writ of prohibition and, upon a rule to show cause, the facts as we have thus detailed them were made to appear.

The respondent insists that this court should not and cannot, under the authority of the doctrines to which the court has attached itself, hear the petition of the relators; that, notwithstanding the fact that they may be residents of Lincoln county, and may be entitled to a change of venue, the question may be raised upon appeal, and that the court will not review the error of the court below by the issuance of an extraordinary writ. Respondent bases this contention squarely upon the case of *State ex rel. Miller v. Superior Court*, 40 Wash. 555, 82 Pac. 875, 111 Am. St. 925, 2 L. R. A. (N. S.) 395. It is insisted by the relator that the court has so modified the doctrine of the *Miller* case in *State ex rel. Wood v. Superior Court*, 76 Wash. 27, 135 Pac. 494, and in *State ex rel. Hopman v. Superior Court*, 88 Wash. 612, 153 Pac. 315, that the writ will issue.

Whether this court will anticipate and review errors of the trial court upon such questions as inhere in the record which may be heard on appeal, is one that has sorely perplexed the judicial mind and much confusion has crept into our cases. But it would seem that the doctrine of *State ex rel. Miller v. Superior Court*, *supra*, is still unimpeached and unimpaired. The real question is whether it was properly ap-

plied in that case. The rule as stated does not deny that the writ will lie where the remedy by appeal is inadequate. It is said, "The adequacy of the remedy by appeal or in the ordinary course of law, is there declared (*State ex rel. Townsend Gas & Elec. L. Co. v. Superior Court*, 20 Wash. 502, 55 Pac. 993) to be the true test in all cases, and not the mere question of jurisdiction or lack of jurisdiction." Hence the inquiry whether the remedy by appeal is adequate, or whether that question, when coupled with a question of jurisdiction is enough to sustain the writ, is not foreclosed.

Our statute provides:

"The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." Rem. Code, § 1027.

"It may be issued . . . in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." Rem. Code, § 1028.

In *State ex rel. Miller v. Superior Court, supra*, the court puts the inquiry, "Has the relator an adequate remedy by appeal?" and proceeds,

"As a general rule, the legislature of this state has deemed an appeal from the final judgment an adequate remedy for the correction of all errors committed in the course of a trial, and, ordinarily, an erroneous ruling on a question of jurisdiction is no exception to this general rule."

But if it be held that a court having jurisdiction may erroneously exercise that jurisdiction, and that its rulings might be adequately reviewed on appeal, it does not follow that the court may so proceed in all cases without denying to a litigant that speed and adequacy of remedy which is sanctioned and guaranteed by the statute. The *Miller* case was, as this one is, a petition for a writ where the court had refused to change the venue of a case to another county. The court did not go beyond the prior decisions of this and other courts declaring the general rule, that the first test in issuing such



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writs is to ask whether a remedy by appeal will be speedy and adequate. It was held that the remedy by appeal was adequate.

It would seem that, to determine the question, as it applies to cases involving the right to change the venue of a case, we should first consider the statutes under which a change of venue may be had, and their legal effect as determined by this court.

Under Rem. Code, §§ 207, 208, and 209, one who is sued in a county other than that of his residence is entitled to a change of venue, if the action be a transitory one.

While it may in general terms be referred to as a privilege, the claim for a change of venue, when once asserted, no question of fact being involved and no discretion of the court invoked, is more than a privilege; it is a right. It has been so held whenever and wherever this court has been called upon to pass upon the question. *State ex rel. Griffith v. Superior Court*, 96 Wash. 41, 164 Pac. 516; *State ex rel. Stockman v. Superior Court*, 15 Wash. 366, 46 Pac. 395; *Smith v. Allen*, 18 Wash. 1, 50 Pac. 783, 63 Am. St. 864, 39 L. R. A. 82; *State ex rel. Schwabacher Bros. & Co. v. Superior Court*, 61 Wash. 681, 112 Pac. 927, Ann. Cas. 1912C 814; *State ex rel. Stewart & Holmes Drug Co. v. Superior Court*, 67 Wash. 321, 121 Pac. 460; *State ex rel. Cummings v. Superior Court*, 5 Wash. 518, 32 Pac. 457, 771; *State ex rel. Campbell v. Superior Court*, 7 Wash. 306, 34 Pac. 1103; *State ex rel. Allen v. Superior Court*, 9 Wash. 668, 38 Pac. 206; 4 Ency. Plead. & Prac., 440.

It would seem, if the statute grants a right that does not depend upon the merit of the case, but is independent of the merit of the case, that a litigant should not be put to the hazard, delay, and expense of a trial upon the merits as a prerequisite to the assertion of the right. In such cases, the court is called upon to deal with something more than "simply a law of procedure and practice," as was held by Judge Dunbar, and properly so, considering the record in the case of

*State ex rel. Townsend Gas & El. L. Co. v. Superior Court*, 20 Wash. 502, 55 Pac. 933. It is a right made equivalent to the right to fix the venue of a local action under the statute, and when asserted should not be thrust aside as an incident or an error to be heard upon an appeal from a judgment on the merits. The terms "speedy and adequate," when applied to remedies, mean, or ought to mean, a remedy adequate and timely to review the particular error relied on, and not merely a remedy which depends upon a proper determination of the issues as defined by the pleadings, and such questions of practice and procedure as may arise in bringing the case to issue, and trying out the facts.

Wherefore it may be said, where there is a right to a trial in a particular place, which right is independent of the issue as tendered by the complaint, an adequate remedy means a trial in the first instance by a court having jurisdiction to hear and determine the merits.

To rule otherwise would bring us to a holding that, although the right to a change depended in no way upon a controverted fact of residence, the defendant would have to meet the delay and expense of a trial, and possibly suffer a judgment (if he have clever counsel he would stand mute and make no defense to the merits), which we would be willing to sustain if we were free to do so. Before we could even consider the merit of the case, we would have to decide the question of venue, or the question of jurisdiction, and do that which ought to have been done in the first place, remand with directions to change the venue and retry the case; and for the reason that the court *did not have jurisdiction*. If we would have to so hold on appeal, why should we not say so now, the record being before us in the same form as it would come on appeal?

It requires no argument to convince the writer that such a situation would be intolerable, and such as the law has sought to avoid by providing a means whereby the appellate court can keep the stream of justice flowing between its proper

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banks. By this proceeding, we may presume that one appeal will settle the merits of the case whatever the judgment of the court below may be. If we deny the writ, we may assume that, in a fair proportion of the cases, two appeals, one abortive and the other to the merit, will be necessary. This has always been the rule where the court below has ordered the venue of a case to another county.

The statute says, Rem. Code, § 1027, that "the writ of prohibition is the counterpart of the writ of mandate." Now if it be so, why have we not the counterpart of this case in the case of *State ex rel. Wyman v. Superior Court*, 40 Wash. 443, 82 Pac. 875, 111 Am. St. 915, 2 L. R. A. (N. S.) 568, where the court said:

"If . . . the superior court of Spokane county had exclusive jurisdiction to hear and determine the garnishment proceedings without power or discretion to order a change of venue, mandamus is the proper remedy."

In *State ex rel. Howell v. Superior Court*, 82 Wash. 356, 144 Pac. 291, the expediency of a proceeding in mandamus to test the right of a court to order a change of venue was not suggested by counsel or questioned by the court. It will be marked that the writ was not denied because it was not a proper case for a writ, but because the court to which it was directed had passed the jurisdiction to try the case to another county.

In *State ex rel. Schwabacher Bros. & Co. v. Superior Court*, 61 Wash. 681, 112 Pac. 927, Ann. Cas. 1912C 814, the court entertained a writ of certiorari to review an order of the superior court, changing the venue of a case from King county to Chelan county. Upon the authority of the *Wyman* case, it was held that the remedy by appeal was inadequate.

In passing, we take it that no argument can be based on the form of the remedy, whether it be certiorari or mandamus or prohibition. The result of our cases, brought here by certiorari, have been the same—to compel the court having

jurisdiction to proceed with the trial, or to refrain from trying the case, as it was in *State ex rel. Griffith v. Superior Court*, 96 Wash. 41, 164 Pac. 516. It is not out of place to say that we question the propriety of resorting to a writ of review in cases of this kind; this, for reasons not necessary to be now discussed.

The reason which is first suggested in the *Wyman* case and followed in *State ex rel. Scougale v. Superior Court*, 55 Wash. 328, 104 Pac. 607, 133 Am. St. 1030, and in *State ex rel. Nash v. Superior Court*, 82 Wash. 614, 144 Pac. 898, for the issuance of a writ of mandamus to compel a court to try a case after it has ordered a change, is, if the jurisdiction be exclusive in the court which assumes to grant the change, mandamus will lie. This is upon the theory that where an erroneous exercise of jurisdiction by the court to which the case may be sent could only be reviewed "eventually" after a trial in the wrong court an appeal does not afford an adequate remedy. Or as said in the *Scougale* case,

"If the change of venue was erroneously made, we cannot presume that the superior court of Snohomish county will assume to exercise jurisdiction; nor could we, upon an appeal from that court, direct the superior court of Pierce county to proceed with the trial. The remedy by appeal is therefore inadequate."

If prohibition be the counterpart of mandamus, it should follow that the one might be employed to compel, and the other to prohibit upon the same state of facts, depending upon whether plaintiff or defendant, invokes the writ. To say that mandamus will lie, if the court to which a case is ordered sent does not have jurisdiction, and *may* refuse to take jurisdiction or delay the case pending a trial, and to deny that prohibition will lie to prevent a court without jurisdiction from trying a case that ought to be sent to another county, is drawing the sights so fine that the "judicial mind" has been put to some extremity to mark the line of cleavage.

In the case of *State ex rel. Lewis v. Hogg*, 22 Wash. 646, 62 Pac. 143, the court says:

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“The remedy [prohibition] is employed only to restrain courts and inferior tribunals exercising judicial functions from acting without or in excess of their jurisdiction; and, if the court or tribunal sought to be restrained has jurisdiction of the subject-matter in the controversy, a mistaken exercise of its acknowledged powers will not justify the issuance of the writ. Stated in another way, ‘it matters not whether the court below has decided correctly or erroneously; its jurisdiction being conceded, prohibition will not go to prevent an erroneous exercise of that jurisdiction.’ High, Extraordinary Legal Remedies, § 772.”

As a general proposition, it may be that a court will not review a question arising in a case by an extraordinary writ where the court committing the error complained of has jurisdiction of the subject-matter, but this test is not to be taken without qualification. It applies where, as in the *Lewis* case, the errors complained of were incident to the proceeding as defined by the pleadings and inhered in the record. It does not apply where the question is collateral to the issue, involves a right given by an independent statute, and which but for the writ would be denied the party entitled to it, or be so postponed as to be a burden instead of a right. The test “jurisdiction of the subject-matter” is elusive. It is questionable whether the rule will bear unqualified statement in that form where the venue of a case ought to be changed and the action is transitory. Either court has jurisdiction to try the issue, and, therefore, jurisdiction of the subject-matter. Or if it be said that jurisdiction of the subject-matter is in the one court or the other, we are not without authority for holding that it is in the court of the county where the relators reside. If a corporation can be sued only in the county of its domicile, and the courts of another county have no jurisdiction of the subject-matter of a case brought against it (*Hammel v. Fidelity Mutual Aid Ass'n*, 42 Wash. 448, 85 Pac. 35; *Whitman County v. United States Fid. & Guar. Co.*, 49 Wash. 150, 94 Pac. 906), then, surely, a citizen who has

claimed his "right" should find the same prohibition in the law.

The words "speedy and adequate" must mean something. Originally the writ was not issued except in a clear case, and then only when there was no other available remedy. *Board of Harbor Line Com'rs v. State ex rel. Yesler*, 2 Wash. 530, 27 Pac. 550. The act of 1895 (Laws of 1895, p. 119, § 30; Rem. Code, § 1028) was passed after the decision last referred to. It may have been that the legislature sought to cure the inflexible rule theretofore laid down by the courts, and to make the writ available where the result of an appeal might tend to embarrass and delay a final decision on the merits of the case.

After a somewhat extensive review of the decisions of other courts, not one case, unless it be *State ex rel. Independent Pub. Co. v. Smith*, 23 Mont. 329, 58 Pac. 867, quoted as authority in the *Miller* case, has been found that denies the right to the writ of prohibition where the venue of a case should be changed as of right. We have reviewed the authorities cited in the Montana case. Wherever it is stated in terms that a writ will not issue to prohibit (or mandamus to compel) a court from proceeding to try a case after refusing to grant a change of venue, some element of discretion was involved. The trial judge had been called upon to pass upon some question of fact, the place of residence was controverted, local prejudice was set up, the convenience of witnesses was put in issue, or whether the ends of justice would be served, had engaged the mind of the court. Obviously no court would review the discretion or the judgment of a court upon a controverted fact under such circumstances.

"The rule appears to be well settled that, where the jurisdiction of the court does not depend upon some controverted fact to be determined by it, and the court is proceeding without or in excess of its jurisdiction, the writ of prohibition will lie." *State ex rel. Hopman v. Superior Court*, 88 Wash. 612, 153 Pac. 315.

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On the other hand, wherever elsewhere the question we have to deal with has occurred, it has been held that it is proper for the writ to issue, because a remedy by appeal is inadequate.

“Where an application for a change of place of trial is made by a defendant, based upon a ground which entitles him to the change as a matter of right, the court to which it is addressed has no discretion except to grant the application. In such cases the court is ousted of jurisdiction to proceed further with the cause than to enter the order of removal. *Pearse v. Bordeleau*, *supra* [3 Colo. App. 351, 33 Pac. 140.] It follows, from what has already been said in discussing the two preceding questions, that the respondent court is divested of jurisdiction to hear and determine this cause, and this brings us to the last question to consider, the determination of which depends upon whether the relator should be remitted to his remedy by appeal or writ of error. The writ of prohibition is not one of right, but whether or not it shall be granted rests in the sound discretion of this court. It is a power conferred by the constitution by means of which, when necessary, supervisory control may be exercised over inferior tribunals, acting without or in excess of their jurisdiction. Although the questions involved upon which the writ is asked may be reviewed on appeal or error, this is not conclusive against the right as to the writ if in the judgment of the court, such remedies are not plain, speedy and adequate.

“We have not overlooked the proposition advanced by counsel for respondent that the district court had jurisdiction to determine the motion for a change, and that in overruling this motion, if this is error, it has merely committed one in the exercise of the jurisdiction conferred upon it by law. If this were the only question involved in this proceeding, the proposition would be unanswerable, but the case does not call for, or admit of, the application of the principle frequently announced that proceedings in prohibition cannot supersede the ordinary functions of an appeal or writ of error. It is essentially different from those cases where we have applied this doctrine. The district court now proposes to proceed with the trial of a case of which it has no further jurisdiction, and it is to restrain this action that these proceedings

were instituted. In other words, while the court originally had jurisdiction of the subject-matter of the action, the parties, and the questions involved in the motion for a change of venue, by denying this motion it assumes an authority and jurisdiction to try the case upon its merits which it does not possess. The difference between cases where we have held that errors complained of would not be reviewed in prohibition because reviewable on error, or appeal, and those in which the proposition is not applicable, is clearly pointed out in *People v. District Court*, 28 Colo. 161, 63 Pac. 321. It would seem idle to require or permit the parties to try their cause in a forum without jurisdiction. For the protection of the plaintiff, as well as the defendant, the cause should be heard by a court the authority of which cannot be successfully attacked." *People ex rel. Lackey v. District Court of Second Judicial District*, 30 Colo. 123, 69 Pac. 597.

The logic of the situation is that, although a court has jurisdiction of the subject-matter and the parties, the assertion of the statutory right to a change of venue, where the nonresidence of the defendant is admitted, ousts the court of first resort of its jurisdiction to proceed in any way other than to order the change.

The attempt to hold to the broad rule quoted from High, Extraordinary Legal Remedies, in *State ex rel. Townsend Gas & El. L. Co. v. Superior Court*, *supra*, upon which the holding in the *Miller* case was predicated, that is, that the writ of prohibition will not issue where there is a remedy by appeal, has been without real result, for in the very nature of things the court has been put to the stress of meeting the statute which allows the remedy when an appeal would be inadequate. But, after all, the logic of every one of our decisions is that the remedy by appeal means an adequate remedy by appeal, and that no certain rule can be laid down for the issuance of the writ, unless it be in cases like the one we have at bar, where the defendant is entitled as of right to a change of venue. To illustrate the thought I have endeavored to suggest, we have but to refer to the *Nash* case (though rightfully decided was probably put upon the wrong



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ground), where the court passed upon the sufficiency of the showing made that a change of venue was necessary for the convenience of witnesses; and the case of *State ex rel. Pierce County v. Superior Court*, 86 Wash. 685, 151 Pac. 108, where the right of a taxpayer to maintain an action against public officers was the real question to be decided. The court held the remedy by appeal to be inadequate and issued a writ of prohibition because of the "special and peculiar circumstances" rendering the remedy in the ordinary course of law inadequate. Certainly it will not be contended by anyone that the sufficiency of the showing made in the *Nash* case, and the capacity of the relator to maintain the action in the *Pierce County* case, could not have been reviewed as errors arising in the course of the trial in the court below.

The governing principle is fairly illustrated in *State ex rel. Calhoun v. Superior Court*, 86 Wash. 492, 150 Pac. 1168. In that case it is made clear that a court will not issue a writ to arrest the exercise of an acknowledged jurisdiction. The remedy being by appeal, that is to say, if the court has jurisdiction to try a controverted question or a challenge to its jurisdiction, such challenge resting in controverted facts, this court will not restrain it although the ruling may be erroneous, but will leave the party to his remedy by appeal. That case is the antithesis of this one; for here, there being no dispute of fact and the right resting in the statute, the court had no jurisdiction to proceed for there was no question of jurisdiction to be determined by juridical expression or otherwise.

To the same effect is *State ex rel. Meyer v. Clifford*, 78 Wash. 555, 139 Pac. 650, where the court was careful to suggest that the words in the statute "in excess" of jurisdiction of such tribunal, do not mean an error either in law or fact committed in the exercise of an acknowledged jurisdiction. If a court is proceeding without having acquired jurisdiction, or insists upon proceeding after it has lost jurisdiction, it presents a state of facts calling for the issuance of

the writ. *State ex rel. Wood v. Superior Court*, 76 Wash. 27, 135 Pac. 494; *State ex rel. Hopman v. Superior Court*, 88 Wash. 612, 153 Pac. 315.

In *State ex rel. Wood v. Superior Court*, *supra*, we have a view of the question from another angle. There the court held, upon the authority of former decisions, that prohibition would lie to arrest proceedings in a court that had not obtained jurisdiction. In principle, this line of cases sustain our present holding; for, if the writ will issue to restrain a court that cannot render an effective judgment because it has not obtained jurisdiction, it should issue to restrain a court that could not render a judgment upon the merits against a party entitled to a change of venue upon the ground of nonresidence.

The question why we do not overrule the *Miller* case may occur. Notwithstanding the conclusion reached by the court and the fact that counsel for both sides have treated the *Miller* case as the one controlling in the case at bar, unless qualified by subsequent decisions, the *Miller* case was rightly decided. The action had been begun against three parties, all nonresidents of the county in which the action was begun. Two of the defendants moved for a change of venue, asserting that all of the defendants were nonresidents and that the convenience of witnesses would be served by the change. The other defendant filed an affidavit asking that the court refuse a change, and an affidavit was filed by the plaintiff showing that the convenience of the greater number of the witnesses would be best served by holding the case for trial in Spokane county. The court refused a change, first, upon the fact of convenience, controverted by the affidavits of the parties; and second, because where two or more parties are sued in the wrong county, all must join in the motion to change the venue upon the ground of nonresidence, or it will be denied. 4 Ency. Plead. & Prac. 419; 40 Cyc. 146. Such being the state of the record, the *Miller* case could not have been decided in any other way, notwithstanding the unqualified statement of the

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holding of the court to be found in the syllabus and in the digest.

We understand counsel to admit the action to be transitory, if the court adheres to the doctrine announced in *Rosenbaum v. Evans*, 63 Wash. 506, 115 Pac. 1054, and cases from this court cited therein. A decree in a case of this kind operates *in personam* and, under the authority of *Rosenbaum v. Evans*, *supra*, and *English v. Gibbons*, 79 Wash. 210, 140 Pac. 322, we hold the action to be transitory and that the relator is entitled to a change of venue as of right.

Writ will issue.

ELLIS, C. J., MOUNT, MAIN, and FULLERTON, JJ., concur.

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[No. 14075. Department Two. July 23, 1917.]

WILLIAM H. RICHARDSON *et al.*, Respondents, v. THE CITY OF SEATTLE *et al.*, Appellants.<sup>1</sup>

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—STIPULATIONS. At the trial of condemnation proceedings, the parties have the power by stipulation to modify a preceding agreement or waiver in the owner's petition for the improvement.

ATTORNEY AND CLIENT—STIPULATIONS—POWER OF CITY ATTORNEY. At the trial of condemnation proceedings, the city attorney has power to bind the city by stipulation waiving the right to make an assessment.

MUNICIPAL CORPORATIONS—ASSESSMENTS—CONCLUSIVENESS—ACTION TO CANCEL. Under Rem. Code, § 7892-23, providing that the confirmation of an assessment roll by the city council shall be conclusive, and § 7892-70, expressly saving all actions or proceedings which may be pending, the rule does not apply to prevent an action to cancel an invalid assessment in proceedings which were begun long prior to the enactment of the statute.

SAME—ASSESSMENTS—ESTOPPEL. Where in condemnation proceedings the city attorney stipulated that no damages should be paid and no assessments levied, and the city ratified the agreement by

<sup>1</sup>Reported in 166 Pac. 639; 168 Pac. 513.

striking the assessment from the rolls, and accepted the benefits, it is estopped to assert jurisdiction years afterwards to levy and confirm an assessment for the improvement.

Appeal from a judgment of the superior court for King county, Smith J., entered January 9, 1917, upon findings in favor of the plaintiffs, in an action for equitable relief, tried to the court. Affirmed.

*Hugh M. Caldwell and Walter F. Meier*, for appellants.

*Benton Embree*, for respondents.

HOLCOMB, J.—Appeal from a judgment or decree of the superior court canceling a local improvement assessment.

No objections were filed nor appeal taken by respondents in the assessment proceedings, but an independent action in equity was instituted to cancel the assessment confirmed against their property.

Prior to May 12, 1906, a movement was started to procure a regrade of that portion of Seattle locally known as Denny Hill. The improvement was initiated by a petition of property owners, which petition, among many others, contains the following recitals:

“That the undersigned hereby reserve the right to claim damages, and the city of Seattle shall ascertain in the manner provided by law the damages to the private property caused by the improvement herein petitioned for; said damages together with the proper costs to be paid by a special assessment to be levied against the property specially benefited. Any part of the compensation, damages or costs that is not finally assessed against said property specially benefited shall be paid from the general fund of the city of Seattle. . . .

“The cost of grading and regrading the streets and avenues lying within the boundary lines of each sub-district as hereinbefore described, together with the cost of all other work necessary or incidental to said grading and regrading shall be borne entirely by the property lying within the limits of said sub-districts respectively, so far as the same may be legally made a lien upon said property.

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"And your petitioners do severally agree, and do hereby bind themselves to pay their just and proportionate part of the cost of improving each sub-district as hereinbefore provided for, irrespective of any award of damages that may be made in favor of any individual property owners in the condemnation proceedings herein petitioned for."

It is exclusively upon the clause last above quoted that appellants base their claim of right to make the assessment in controversy.

This petition was signed by May Ray, who with her husband at that time owned as community property the particular half lot here involved. After the filing of the petition of the appellant seeking condemnation of the property pursuant to the petition for the improvement, and before the trial of the cause and the return of a verdict therein touching this property, Mrs. Ray and her husband conveyed the property to Katherine E. Polson, and thereafter on January 5, 1916, Mrs. Polson conveyed the property to respondents.

The property owners' petition and the ordinance providing for the condemnation required the widening of the streets involved, whereby twelve feet were to be taken off this property, and also required changes in the grades of the streets which resulted in leaving this particular half lot about fifty or sixty feet above the newly established grade.

At the trial of the condemnation proceedings touching this lot, testimony was introduced on the part of the city, before the court and jury trying the cause, to the effect that the improvements then upon the land, consisting of a three-story apartment house of the value of about \$5,500 or \$6,000, on account of the necessary one-to-one slope required by the ordinance to be made upon the property in excavating the streets to the new grade would be entirely destroyed; and also that the damages to that portion of the lot not taken by the proceedings by reason of the change of grade and the regrading of the street would far exceed in amount the special benefits to the lot by reason of the making of the contemplated im-

provement. It was then considered by the corporation counsel and the experts employed by the city to determine the damages and special benefits to the various parcels of property involved, and also by the attorneys for Mrs. Polson, who then owned the property, that the assessments against this property, for both the condemnation proceeding and the actual physical work by the contractor of grading the streets in accordance with the new grade, would be between \$3,000 and \$4,000. The then corporation counsel for the city estimated the average total of assessments against a full sized lot would be about \$4,200 or \$4,300. In other words, it was considered by all parties concerned that the damages to this particular half lot would far exceed in amount the special benefit thereto by reason of the improvement, and this was admitted by the representatives of the city then engaged in the condemnation proceedings. The then corporation counsel who was trying the condemnation case and the attorney for Mrs. Polson during the trial of the case entered into an oral stipulation, in open court before the court and jury, to the effect that Mrs. Polson would waive all damages, over and above one dollar, to the remainder of the lot not taken by reason of the change of grade and doing the physical work of regrading the street to the new grade, and that, in consideration thereof, the city would exempt the lot from any assessment whatever both for condemnation and for making the physical improvement, and that a verdict should be returned accordingly. After making this stipulation and at the close of the evidence, the court instructed the jury in the condemnation case, in accordance with the stipulation of counsel, to the effect that the jury should ascertain from the evidence introduced the amount of damages and the amount of the special benefits to the remainder of the lot not taken by reason of changing and establishing the new grades and the grading and regrading of the streets in conformity with the new grade; and that, if the jury found that the special benefits exceeded the damages, then they should return a verdict of

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no damages to the lot; but that in the event they should find from the evidence that such damages exceeded the special benefits, then they should take into consideration the waivers of the parties and, in accordance therewith, return a verdict of one dollar damages to such remainder. Based upon the evidence, the stipulation, and the instructions, the jury returned a verdict whereby they determined that the owner was entitled to \$1,300 for the twelve feet taken, one dollar damages to the remainder by reason of the part taken, and the further sum of one dollar damages to the remainder by reason of the changing of the grade and grading and regrading the streets and making the physical improvement in accordance with the new grade. This verdict was rendered in January, 1907, and in conformity with the verdict, judgment was entered thereon and the amount of the awards was paid by the city.

After the entry of the judgment, and on September 28, 1907, the city caused to be prepared and filed an assessment roll to cover the cost of excavating the streets and making the physical improvement in accordance with the newly established grades. This roll showed that the lot here involved was assessed in the sum of \$1,884.43. Mrs. Polson filed objections to the making of any assessments against the lot. The roll was then referred by the council to the street committee of the council for consideration and report. The city council and the street committee, while the roll was before them for consideration for many months, were advised, by the corporation counsel and by Mrs. Polson's counsel who appeared before them on many occasions in support of the objections made to the assessment, of the fact of the making of the stipulation during the condemnation proceedings and of the award of damages to the remainder of the lot based on the stipulation, and the corporation counsel of the city advised the council and the street committee that, on account of that stipulation and the award based thereon, the property was exempt from assessment. Thereupon and by reason of the

stipulation and the award of damages to the lot and on the advice of the corporation counsel, the city council struck the assessment from the roll and vacated the same entirely as to this half lot, but approved and affirmed the roll as to the other property thereon. This confirmation was in January, 1909.

The city made no other assessment against the lot on account of the improvement for nearly seven years, until October, 1915, when it passed an ordinance directing the making of a supplemental assessment, basing its right so to do upon the last clause, heretofore quoted, in the property owners' petition. Pursuant to this ordinance, the city caused an assessment roll to be prepared and filed and an assessment to be made against this lot, which it confirmed by ordinance in July, 1916, long after the purchase by respondents. This is the assessment assailed by the respondents and which the lower court held was made by the city council without jurisdiction. Respondents had no notice of the preparation of this roll or that the city contemplated making any assessments against the property until long after the roll had been confirmed and placed in the hands of the treasurer for collection.

Appellants contend that the corporation counsel, at the time of the trial of the condemnation proceedings, evidently overlooked the provision contained in the property owners' petition wherein the signers agreed to pay their just and proportionate share of the cost of making the improvement notwithstanding any award of damages in the condemnation proceedings. But this assertion is not borne out by the record.

It must be remembered that, by another clause in the petition of the property owners, they reserved the right to claim all damages from the city, to be ascertained in the manner provided by law; and while they did in a further paragraph agree to bind themselves to pay their just and proportionate part of the cost of improving irrespective of any award of damages, nevertheless their later agreement and stipulation made at the trial of the condemnation proceeding modified



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or set aside the preceding agreement or waiver in their petition. That they had the right and power so to modify a previous agreement has been upheld by this court in such a matter in *Seattle School Dist. v. Seattle*, 63 Wash. 245, 115 Pac. 173.

Appellants contend, however, that the corporation counsel of the city of Seattle had no authority to enter into such a stipulation as that made at the condemnation trial, and that the city could not be bound thereby. That contention cannot be sustained. The corporation counsel was a duly authorized representative of the city to act for it in all trials and proceedings at law. It is a general rule that a party to an action is bound by the stipulations and agreements entered into by his counsel in open court as a part of the proceedings in the cause; and the acts and doings of the attorney are the acts and doings of the client. 4 Cyc. 934-5; 2 R. C. L., § 63, p. 986; *Coonan v. Loewenthal*, 129 Cal. 197, 61 Pac. 940. If the corporation counsel had no authority to make such stipulation, he had no authority to proceed in any way during the trial unless each step that he took was first authorized by the legislative or political body of the city.

It is contended by appellants that the court had no jurisdiction over the subject-matter, this contention being based upon § 23 of chapter 98 of the Laws of 1911, p. 455, relating to local improvements, which provides, among other things, that:

“Whenever any assessment roll for local improvements shall have been confirmed by the council . . . the regularity, validity, and correctness of the proceedings relating to such improvement, and to the assessment therefor, including the action of the council upon such assessment-roll and the confirmation thereof, shall be conclusive in all things upon all parties, and cannot in any manner be contested or questioned in any proceeding whatsoever by any person not filing written objections to such roll in the manner and within the time provided in this act, and not appealing from the action of the council in confirming such assessment-roll in the

manner and within the time in this act provided. No proceeding of any kind shall be commenced or prosecuted for the purpose of defeating or contesting any such assessment, or the sale of any property to pay such assessment, or any certificate of delinquency issued therefor, or the foreclosure of any lien issued therefor," etc. Rem. Code, § 7892-23.

Section 70 (p. 480) of the same chapter specifically reserves all rights of action under existing laws which this act in any way supersedes or repeals, if the same at the time of taking effect of this act shall have been commenced.

"All actions and proceedings, which may be pending in court under existing laws which this act in any way supersedes or repeals, shall proceed without being in any manner affected by the passage of this act." Rem. Code, § 7892-70.

These proceedings were begun long prior to the passage of chapter 98 of the Laws of 1911, p. 441 (Rem. Code, § 7892-1 *et seq.*), and this suit is exactly the same kind of a suit as that brought in the cases of *Michaelson v. Seattle*, 63 Wash. 230, 115 Pac. 167, and *Seattle School Dist. v. Seattle*, *supra*. The lower court therefore had jurisdiction of the subject-matter and of the parties.

It is further contended that the city council had jurisdiction to levy and confirm the assessment regardless of the stipulations entered into in the condemnation proceeding. As was aptly observed by Judge Rudkin in *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106:

"If the city cannot deprive a citizen of his property without due process of law in a single proceeding, it cannot accomplish the same result by two or more proceedings. Whether the proceedings are dependent or independent, the fact remains that an attempt is here made to levy an assessment on property for a local improvement after all local and special benefits to the property have been offset against damages."

While the question there determined was slightly different from the question here involved, the logic of the observations

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there made may be applied with equal force here. The city deliberately led the owner of this property into an arrangement whereby the owner would not recover any damages except the nominal damages agreed upon, in consideration of which the city would not levy any assessments upon the property for the improvement. This condemnation agreement was later ratified by the city in striking from the roll the assessment which was made upon this property, in order to give full faith to the stipulation and the verdict and award which had been made in the condemnation proceeding. It will not do to say that the city council and its corporation counsel had lost sight of the provisions of the property owners' agreement until the time when they attempted to levy the new assessment upon the property in 1915. That was before them originally, and was before them in the condemnation trial and in the proceedings to levy the assessment for the actual improvement. The city not only made these agreements with the property owners, but acted upon the agreements and accepted the benefits thereof. We think for these reasons it is estopped to contend that it had jurisdiction to levy and confirm the assessment. *James v. Seattle*, 57 Wash. 318, 106 Pac. 1114; *Smith v. Seattle*, 41 Wash. 60, 82 Pac. 1098; *State ex rel. Lippincott v. Spokane*, 44 Wash. 688, 87 Pac. 944; *Connor v. Seattle*, 82 Wash. 296, 144 Pac. 52.

The judgment is right and must be affirmed. It is so ordered.

ELLIS, C. J., MOUNT, PARKER, and FULLERTON, JJ., concur.

ON PETITION FOR REHEARING.

[*En Banc*. Nov. 16, 1917.]

PER CURIAM—By inadvertent clerical error, this case, though submitted and heard by the full bench, was signed only by the judges of Department Two, which is one ground of petition by appellants for a rehearing *En Banc*.

The other grounds upon which a rehearing has been de-

manded by appellants have been examined and found by a majority of the court, without merit.

The petition for rehearing, having been examined by the entire court, the original opinion is by a majority thereof sustained and rehearing is denied.

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[No. 14139. Department Two. July 23, 1917.]

GRAYS HARBOR COMMERCIAL COMPANY, *Respondent*, v. L. R. FIFER, *as Fifer Lumber Company, Appellant*.<sup>1</sup>

RECEIVERS — APPOINTMENT — GROUNDS — COMPLAINT—SUFFICIENCY. The court has no power to appoint a receiver of a corporation in an action at law upon an open account where the complaint does not indicate in any way that any kind of equitable relief is asked, there being no showing that would even bring the case within Rem. Code, § 741, subd. 6th, providing for the appointment of receivers in "such other cases as may be provided by law, or when, in the discretion of the court, it may be necessary to secure ample justice to the parties."

Appeal from an order of the superior court for King county, Tallman, J., entered November 6, 1916, appointing a receiver. Reversed.

*Walter Metzenbaum*, for appellant.

*Baxter & Jones*, for respondent.

HOLCOMB, J.—On October 31, 1916, the plaintiff brought a suit in the superior court of King county against L. R. Fifer, doing business as the L. R. Fifer Lumber Company. The complaint is in form the one ordinarily used in stating an action at law upon an open account. The capacity of the corporation to sue is set out, and the last paragraph of the complaint alleges that the defendant has become indebted to the plaintiff in the sum of \$160.08 for lumber and shingles purchased from it during the last three years preceding the

<sup>1</sup>Reported in 166 Pac. 770.

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commencement of the action. A demand is made for judgment for the \$160.08, together with costs and disbursements. The complaint does not seem to indicate in any way that any kind of equitable relief is asked. The record shows that, on the date of the filing of this complaint, an order to show cause was made, upon the motion of plaintiff's counsel, and was made returnable on November 3, 1916. This order requires the defendant to appear on the last named date and show cause why a receiver should not be appointed.

Appellant's brief states that, at the time plaintiff's complaint was filed, it was accompanied by an affidavit of one of the attorneys for the plaintiff which stated facts that would tend to show that equitable relief was to have been asked for. This affidavit, although referred to in the brief as being in the record, does not appear therein.

On November 3, 1916, Mark Munson was appointed receiver of L. R. Fifer. The formal order was filed November 6, 1916. Since that date, no action seems to have been taken other than the bringing of this appeal, which appeal is taken from the order of the court appointing a receiver.

The appellant's one assignment of error is that the court erred in appointing a receiver *pendente lite* of the goods and effects of the defendant. The argument is directed along two lines, the first being that the court was without jurisdiction; if this should not be sustained, then that there was a wrongful exercise of discretion.

If there exists any legal justification, it is probably based upon the 6th subdivision of Rem. Code, § 741, and that is the reason recited in the order for the appointment made herein. It clearly could not be founded upon any of the other five subdivisions of that section. The 6th subdivision of § 741 is as follows:

“And in such other cases as may be provided for by law, or when, in the discretion of the court, it may be necessary to secure ample justice to the parties: Provided, that no party or attorney or other person interested in an action shall be appointed receiver therein.”

Even under this statutory authority, the "discretion of the court" is to be exercised only when "it may be necessary to secure ample justice to the parties."

As a rule, in law actions, there are adequate auxiliary law remedies. It is only in extraordinary instances where the ordinary auxiliary law remedies will give no adequate and speedy relief, that the aid of equity can also be invoked to assist in preserving the fruits of a law action.

A receivership is merely ancillary to the main cause of action, and is not an independent remedy. The appointment of a receiver can be invoked only in a pending suit brought to obtain some relief which the court has jurisdiction to grant, and cannot be employed to determine finally the rights of the parties. *American Loan & Trust Co. v. Toledo, C. & S. R. Co.*, 29 Fed. 416; *Leary v. Columbia River & P. S. Nav. Co.*, 82 Fed. 775; *In re Brant*, 96 Fed. 257; *Vila v. Grand Island Elec. Light, Ice & Cold Storage Co.*, 68 Neb. 222, 94 N. W. 136, 97 N. W. 613, 110 Am. St. 400, 63 L. R. A. 791; 4 Ann. Cas. 59.

As a general rule, in the absence of special circumstances showing the necessity for placing the property in the custody of the court, a court of equity will not appoint a receiver when the party seeking relief has an adequate and complete remedy at law. *Pearce v. Jennings*, 94 Ala. 524, 10 South. 511; *McElwain v. Willis*, 9 Wend. (N. Y.) 548.

The power to appoint a receiver is never exercised if any other safe and expedient remedy can be used. *Corey v. Long*, 43 How. Pr. 492, 497.

A receiver will not be appointed if garnishment, execution, and attachment will enable the creditor to reach the property sought. *Tumlin v. Vanhorn*, 77 Ga. 315, 3 S. E. 264; *Buckeye Engine Co. v. Donau Brewing Co.*, 47 Fed. 6; *Starr v. Rathbone*, 1 Barb. (N. Y.) 70; *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781.

This court has adopted the rule that the right to appoint receivers, which is vested in the courts, should be exercised

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only when it is clearly shown that it is necessary to prevent the defeat of justice. *Roberts v. Washington Nat. Bank*, 9 Wash. 12, 37 Pac. 26.

In the case of *Ridpath v. Sans Poil & Columbia River Ferry Transp. Co.*, 26 Wash. 427, 67 Pac. 229, the court, at p. 431, says:

“While the power to appoint a receiver to manage the business of a corporation, pending an action between parties over their respective rights therein, exists in courts of general jurisdiction, it is a power, nevertheless, which should be exercised with caution, and only under such circumstances as seem to demand exemplary relief. To appoint such a receiver is the exercise of an extraordinary remedy, and is to be resorted to only when the ordinary remedies are inadequate. The purpose of such an appointment is to prevent the defeat of justice. . . . A litigant in such a cause cannot, therefore, prior to the determination of his asserted claims, demand the appointment of a receiver as a matter of right. He must show some necessity for the extraordinary remedy; . . .”

The application for a receiver must be supported by evidence that the appointment of a receiver is necessary. The mere statement that there is danger of fraud, mismanagement, etc., is not sufficient. *Haines v. Carpenter*, Fed. Cas. No. 5,905; *Baker v. Backus*, 32 Ill. 79; *Brundage v. Home Sav. & Loan Ass'n*, 11 Wash. 277, 39 Pac. 666.

The court may appoint a temporary receiver *pendente lite*, but the complaint must state a cause of action for such appointment. *Sullivan Elec. Light & Power Co. v. Blue*, 142 Ind. 407, 41 N. E. 805.

In an application for the appointment of a receiver, the plaintiff must show, (1) either that he has a clear right to the property itself, that he has some lien upon it, or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim; and (2) that the possession of the property by defendant was obtained by fraud, or that the property itself, or the income arising from it, is in danger of loss from neglect, waste, misconduct, or

insolvency. 34 Cyc. 19; *O'Mahoney v. Belmont*, 62 N. Y. 133; *Thompson v. Adams*, 60 W. Va. 463, 55 S. E. 668; *Union Boom Co. v. Samish Boom Co.*, 33 Wash. 144, 74 Pac. 53.

Until a creditor has obtained a judgment at law for his demand against the debtor, and the return of an execution unsatisfied, an action in equity will not lie to reach assets and apply them to the payment of a moneyed demand arising upon a contract, express or implied. Allegations of insolvency do not change this rule. *Adee v. Bigler*, 81 N. Y. 349; *Estes v. Wilcox*, 67 N. Y. 264.

No sufficient showing was made in this case upon any theory whatever to warrant the appointment of the receiver. The order is reversed.

ELLIS, C. J., MOUNT, FULLERTON, and PARKER, JJ., concur.

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[No. 13804. Department One. July 25, 1917.]

VERE PENNECARD, *Appellant*, v. GIANT LEDGE MINING  
COMPANY *et al.*, *Respondents*.<sup>1</sup>

CORPORATIONS—STOCK—ASSESSMENTS — BY-LAWS—CONDITIONS. A by-law that no assessment shall be levied upon stock while any previous one remains unpaid unless the power of the corporation shall have been exercised to collect it, was intended for the protection of stockholders who have fully paid their assessments and does not exempt from further assessment one who is in default and refuses to pay all his assessments.

SAME—BY-LAW—REPEAL. Under by-laws providing that they may be amended or repealed by a majority vote of the trustees at a monthly meeting after notice given at the previous meeting, a by-law repealed at a monthly meeting without notice is repealed by approval of the proceedings at the next monthly meeting, the same trustees being present at both meetings.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered May 25, 1916, upon findings in

<sup>1</sup>Reported in 166 Pac. 629.



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favor of the defendant, in an action to cancel a sale of corporate stock, tried to the court. Affirmed.

*McWilliams, Weller & Brown*, for appellant.

*Cullen, Lee & Matthews*, for respondents.

MORRIS, J.—Appellant was the owner of 10,750 shares of the capital stock of the respondent corporation, which stock was, upon its face, subject to assessments. At the time of its purchase, a small cash payment was made upon the stock, and thereafter between June 9, 1914, and July 15, 1915, ten assessments were made upon appellant's stock, amounting to \$96.75. Notice of these assessments was sent to and received by appellant. He refused to pay any of them, and on September 18, 1915, his stock, following the statutory proceedings, was sold to respondent Prescott. No question arises as to the manner of the sale.

The only contention raised on this appeal by appellant is that the assessments were illegally made in that section 3, article 3, of the by-laws provides that:

“No assessment shall be levied while any portion of the previous one remains unpaid unless the power of the corporation shall have been exercised in accordance with the provisions of this article for the purpose of collecting such previous assessments, or the collecting of the previous one has been enjoined.”

The evident purpose of this by-law is the protection of stockholders who have fully complied with assessments made against their stock. Such stockholders under the by-law were not to be burdened with subsequent assessments until all stockholders had contributed pro rata, so that a few stockholders could not be made to bear the burdens of the corporation. It cannot mean, as contended by appellant, that one who fails to pay an assessment against his stock thereby exempts himself from any further assessment. The assessments were properly made.

Another question is whether or not this section of the by-laws was repealed. The by-laws provide that they may be altered, amended, or revoked by majority vote of the trustees at any monthly meeting, notice being given at a previous meeting of any intended change, and that the change must not be acted upon for at least one month from the time of giving of notice. On June 9, 1914, the trustees, at a regular meeting, made certain changes in the by-laws, among them repealing section 3, article 3. The next regular meeting of the trustees was held on July 14, 1914, at which time the only business transacted was the approval of the transaction of the meeting of June 9. Appellant now contends that section 3 was not repealed, in that it was not shown that notice was given of the intended change in the by-laws. There is no merit in this contention. The same trustees were present at both meetings. The most that could be said is that the changes proposed at the meeting of June 9 would not take effect until the regular meeting of July 14. But whether they took effect on June 9 or July 14 is immaterial. Neither is it material whether or not the by-law is or is not in force, since it in no manner affects the sale of delinquent stock.

Judgment affirmed.

ELLIS, C. J., CHADWICK, and MAIN, JJ., concur.

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Opinion Per MORRIS, J.

[No. 13867. Department One. July 25, 1917.]

MYRTLE McQUEEN, *Respondent*, v. PEOPLE'S STORE  
COMPANY, *Appellant*.<sup>1</sup>

MASTER AND SERVANT—INJURY TO THIRD PERSON—SCOPE OF EMPLOYMENT. The driver of a delivery truck employed to make deliveries of goods acts outside of the scope of his employment, where he, for his own pleasure, invited girls to ride a short distance on the running board of the car; and the employer is not liable for injuries sustained through the negligence of the driver.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered October 6, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in an automobile accident. Reversed.

*Bates, Peer & Peterson*, for appellant.

*Govnor Teats, Leo Teats, and Ralph Teats*, for respondent.

MORRIS, J.—The People's Store Company is a corporation conducting a large department store at Tacoma, employing, among others, William Buhre as a driver of one of its automobile trucks used in the delivery of merchandise to its customers. The duties of this driver are such as usually appertain to a position of like character, requiring him to load the truck at the store with goods and parcels and deliver them to customers in different parts of the city. He had as an assistant a man named Larson, whose duty it was to go with him and carry the parcels into the different homes. On the day of the accident, Myrtle McQueen and a girl friend, acquaintances of Buhre and Larson, met them at Sixtieth and K streets, and engaged them in conversation for a short time. Sometime later, Buhre and Larson were at Fifty-sixth and O streets, when the two young ladies again appeared and again the parties engaged in conversation. Miss McQueen noticed

<sup>1</sup>Reported in 166 Pac. 626.

her brother-in-law in front of his home a short distance from the place where the automobile was standing, and saying to Buhre, "There is my brother-in-law," she went around on the opposite side of the truck to conceal herself from her brother-in-law's view. The young ladies then sat down upon the running board of the car, a long step about twelve inches wide and about twelve inches from the ground, running lengthwise of the car. Upon Larson's return to the car from the delivery he had been making, Buhre said to the young ladies: "Sit still, girls, and I will drive across the street." The car was then driven across Fifty-sixth street and onto O street. Fifty-sixth street was paved. O street was not. As soon as the car left the pavement on Fifty-sixth street, plaintiff states, seeing she was in a dangerous situation, she called upon Buhre to stop the automobile. He either did not hear her or did not heed her, and after going a short distance, she either jumped or was thrown from the car, the automobile passing over one of her feet, causing the injuries complained of. Appellant made the usual motions looking to a dismissal of the action, and for directed verdict and judgment, all of which were denied, and a verdict returned for respondent in the sum of \$666.

Appellant presents two questions. First, that, in inviting the respondent to remain upon the running board of the truck while he crossed the street and in conveying her to the place where the accident occurred, Buhre was not acting within the scope of his employment, thus exempting the appellant from liability for his act. Second, that respondent was guilty of contributory negligence. While no decisive test can be given for determining whether or not a given act is within the scope of a servant's employment, it is apparent from all the authorities that the act complained of must have been done while the servant was engaged in doing some act under authority from his master; not that, while engaged in the act, he is employed in the master's business; but the act must have been in the furtherance of the master's business and such

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as may be fairly said to have been either expressly or impliedly authorized by the master. Wood, Master and Servant (2d ed.), § 307. When the servant is authorized to do the act, the master is liable for its performance. He cannot excuse himself because an authorized act was improperly or unlawfully performed. In other words, so long as the thing the servant is doing is in the furtherance of the master's business, the master must answer for the manner in which the act is done. These and similar statements of the law form the basis of our holdings in *Robinson v. McNeill*, 18 Wash. 163, 51 Pac. 355; *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 125 Am. St. 915, 14 L. R. A. (N. S.) 216; *Linck v. Matheson*, 63 Wash. 593, 116 Pac. 282; *Matsuda v. Hammond*, 77 Wash. 120, 137 Pac. 328, 51 L. R. A. (N. S.) 920; and *Bursch v. Greenough Brothers Co.*, 79 Wash. 109, 139 Pac. 870.

In the *Matsuda* case, it was sought to hold the employer liable for an assault committed by an employee during a controversy arising out of an attempt to collect for goods sold. Liability was denied upon the ground that, while the employment authorized the collection, it would not render the employer liable for the unlawful act of the employee in making the collection. In so holding, Fullerton, J., writing the opinion, rested it upon the principle that the act causing the injury must pertain to the duties which the servant was employed to perform and is being done as a means or for the purpose of doing the work assigned him by the master, citing appropriate authority.

If a servant, while committing an assault, was not acting within the scope of his employment, though authorized to make collection, the assault growing out of a controversy arising out of the attempted collection, then Buhre, in inviting these girls to ride upon the running board of the truck, was not acting within the scope of his employment, there being no question that he had no authority to invite or permit persons to ride with him while delivering merchandise for

appellant. The latest expression from this court upon the application of the rule here involved is *Gruber v. Cater Transfer Co.*, 96 Wash. 544, 165 Pac. 491. Gruber was injured though the alleged negligence of the driver of an automobile truck which had been furnished by the transfer company for the purpose of moving Gruber's household goods. At the invitation of the driver, Gruber got upon the truck and sat down upon a small trunk facing the rear, from which he was thrown or fell while the truck was passing over an uneven street crossing. The case was disposed of upon the ground that the driver of the truck had no real or apparent authority to allow or permit Gruber to ride upon the truck; or, stated as a legal proposition, that the driver was not acting within the scope of his employment. The *Matsuda* case and the *Gruber* case sustain appellant's first contention: In inviting the girls to ride upon the truck, Buhre was engaged in furthering his own pleasure and not in furthering his master's business. His employment was to drive the truck. In inviting these girls to ride with him, he was neither doing it as a means nor for the purpose of performing that work. It had no connection with his work, either directly or indirectly. In extending this invitation, Buhre was acting without any reference to the business in which he was employed. It was an independent and private purpose of his own contributing to his pleasure but not to his service. While so acting, he was his own master irrespective of the fact that the facilities afforded him to do his work were instrumental in inflicting the injuries complained of. 2 Cooley, Torts (3d ed.), p. 1031. This conclusion renders it unnecessary to discuss appellant's second contention that respondent was guilty of contributory negligence.

The judgment is reversed and the cause remanded with instructions to dismiss the action.

ELLIS, C. J., MAIN, and CHADWICK, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 13960. Department One. July 25, 1917.]

AUGUST WEIFFENBACH, *as Seattle Cornice Works,*  
*Respondent*, v. BURNS LYMAN SMITH *et al.*,  
*Appellants*.<sup>1</sup>

CONTRACTS—BUILDING CONTRACTS—DISPUTES — AMBIGUITY — PROVINCE OF UMPIRE. A provision in a building contract that all disputes shall be settled by the architect, whose decision shall be final, has no application, where two sets of specifications were furnished for the installation of ventilators, one for the masonry providing for galvanized iron, and the other for carpentry calling for copper, and the principal contractor, upon inquiry, instructed the subcontractor to bid on galvanized iron, and during the progress of the work, insisted upon copper and agreed to pay for the same as an extra; since the dispute was over an ambiguity in the contract which the parties could and did settle themselves before contracting.

SAME—BUILDING CONTRACTS—SPECIFICATIONS—EXTRAS. In such a case, the specifications requiring copper manufactured by the R. Co. "and not elsewhere," do not apply, since the contract was made with reference to galvanized iron in the other set of specifications, and the principal contractor's agreement to pay for copper manufactured by the subcontractor as an extra puts the burden upon him of settling the dispute with the owner at his own cost.

Appeal from a judgment of the superior court for King county, George H. Walker, Judge *pro tempore*, entered July 11, 1916, in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

*George R. Biddle* and *H. L. Morrison*, for appellants.

*F. C. Kapp*, for respondent.

CHADWICK, J.—The respondent was invited to bid on the installation of certain ventilators and flashings for the L. C. Smith Building, Seattle, Washington. He was given two sets of specifications; one for masonry, and one for carpentry work. The specifications were prepared by architects having offices in Syracuse, in the state of New York. The set of specifications for masonry provided that the flashings and

<sup>1</sup>Reported in 166 Pac. 613.

ventilators should be of galvanized iron of the Burt type. The set of specifications for carpentry provided that the flashings and ventilators should be of copper, and of a kind manufactured by the Royal Ventilator Company of Philadelphia, Pennsylvania.

The appellant, The Whitney Company, had its chief office in New York City. The respondent inquired of its representative having charge of its work on the Smith Building as to the meaning of the specifications, and which type of ventilators he should bid on, and was told by him to bid upon galvanized iron. The respondent accordingly filed a bid in which he stated that his bid was for galvanized iron construction. In the progress of the work, the representative of the owner objected to the galvanized iron and insisted that the ventilators and flashings should be of copper. The respondent testifies that it was then understood by and between the representative of the principal contractor and himself that he should proceed to put in copper construction of his own manufacture and that the same would be paid for as extra work. Ventilators of the Royal Ventilator type, but manufactured by the respondent, were installed. The work was rejected by the agent of the owner as not being in accord with the provisions in the specifications that the ventilators should be manufactured by the Royal Ventilator Company of Philadelphia, Pennsylvania. The appellants refused to pay for the work done by respondent. Upon suit brought, a judgment was rendered in the court below for the amount of his demand.

It is insisted on the part of the owner and principal contractor that the difference which has arisen between the parties comes within the provision which is common to all specifications and contracts, that such disputes must be referred to the architect for his decision, and which, being made, is final.

This court, in common with many other courts, has held that, where parties contract, they may agree that disputes arising as to the meaning of plans and specifications may be



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referred to an architect, and his decision shall be final; yet that rule has no room for application here. The dispute out of which this controversy arises arose prior to the time any contract was entered into. The difficulty was understood by the parties; they settled it for themselves; and contracted with reference to it. An architect can settle disputes arising during the progress of the work, but cannot vary, or make, or unmake contracts which are not subject to construction.

To apply the rule contended for, would work positive injustice, for the controversy comes not out of a dispute but out of an agreement. The two sets of specifications were prepared by the architects and put in the hands of the respondent by the principal contractor. Respondent had then assumed no relation whatever to the owner. With the two sets of specifications before him, he did the natural thing. He asked the principal contractor, with whom he was dealing, which set should control his bid on the ventilators and flashings. He had a right to assume that all differences and ambiguities arising in or out of the specifications had been settled by the principal contractor when it made its bid, and to rely upon its assurance. The law ought to presume, as between a principal contractor and a subcontractor, that the principal contractor knows the true intent and meaning of the specifications and has contracted with reference thereto. If this be sound, it would follow that the principal contractor should be held to the burden of settling, at his own cost, any dispute subsequently arising between the principal contractor and the owner or architect.

That part of the carpentry specifications upon which appellant relies is, "Ventilators shall be manufactured by The Royal Ventilator Company of Philadelphia, Pa., instead of those elsewhere specified." Importance is attached to the words "instead of those elsewhere specified," but we think it is not the legal privilege of the appellant to isolate this phrase. The words are no more prominent in the one set of specifications than are the words, "All ventilators shall be

of galvanized iron of the Burt type," in the other set of specifications.

Respondent made definite inquiry, and appellant should be bound by the answer which it made and upon which respondent, by the very written terms of his bid, fixed a price for his labor and material.

The words "instead of those elsewhere specified" should not be held to mean anything other than elsewhere specified in *this* set of specifications. Otherwise, a set of specifications being one of a number would be a trap for the unwary and a menace which even ordinary care and prudence could not guard against. A subcontractor would be the victim of the inefficiency, stupidity, or inexcusable carelessness of the architect, for the architect, in turn, could say, "It is true that you are the victim of my fault, but I am authorized by your contract to metamorphose my fault into a 'dispute' and compel you to answer for it."

The law, at its best, works much injustice, but it should never be so unless the injustice suffered by the individual is necessary—a vicarious sacrifice, as it were—for the common good.

Settlement by the parties, before signing, of ambiguities in a building contract has been sustained as within their right to control without bringing themselves within the umpire clause of the building contract. *Shepard & Sons v. First Nat. Bank of Wilkes-Barre*, 232 Pa. 649, 81 Atl. 715; *Snead & Co. Iron Works v. Merchants' Loan & Trust Co.*, 225 Ill. 442, 80 N. E. 237, 9 L. R. A. (N. S.) 1001; *Morgan v. Murdough*, 216 Mass. 502, 104 N. E. 455.

We find no error.

Affirmed.

ELLIS, C. J., MORRIS, and MAIN, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 13976. Department One. July 25, 1917.]

SIMON SABOT, *Respondent*, v. FANNIE S. SABOT, *Appellant*.<sup>1</sup>

**DIVORCE—GROUNDS—CRUELTY—INDIGNITIES.** Indifference is an indignity and unconcealed aversion is cruelty, within Rem. Code, § 982, authorizing a divorce for cruelty or personal indignities rendering life burdensome.

Appeal from a judgment of the superior court for Klickitat county, Darch, J., entered June 7, 1916, upon findings in favor of the plaintiff, in an action for divorce. Affirmed.

*E. L. Sanders and Ralph Simon*, for appellant.

CHADWICK, J.—The only question in this case is whether the findings of fact are sufficient to sustain the decree.

The court found:

“That for a period of two years last past the defendant has assumed and maintained towards plaintiff an indifferent attitude, and has made no attempt to conceal that she has neither affection nor regard for the plaintiff, and has by numerous annoying acts and words, made the home life of plaintiff burdensome in the extreme, so that it has become impossible for the plaintiff to longer cohabit and live with said defendant, all of which acts were without just cause or provocation.”

“Cruel treatment of either party by the other, or personal indignities rendering life burdensome” are made grounds for divorce by the statute. Rem. Code, § 982.

Indifference is an indignity and unconcealed aversion is a cruelty within the meaning and intent of the statute. They are more refined but no less substantial than words or blows or neglect.

Affirmed.

ELLIS, C. J., MOUNT, MAIN, and MORRIS, JJ., concur.

<sup>1</sup>Reported in 166 Pac. 624.

[No. 13980. Department Two. July 25, 1917.]

THE CITY OF EVERETT, *Respondent*, v. GEORGE R. COWLES,  
*Appellant*.<sup>1</sup>

MUNICIPAL CORPORATIONS—ORDINANCES—TITLE AND SUBJECTS. A provision in an ordinance regulating the prescription of intoxicating liquors by a physician is germane to a title reciting that it relates to the sale and disposition of intoxicating liquors.

CRIMINAL LAW—COMPLAINT—AMENDMENT ON APPEAL FROM JUSTICE OF PEACE. Upon appeal from a conviction in justice court, if the complaint did not charge a crime, the prosecution may file a new complaint in the superior court upon which trial proceeds after arraignment and plea.

SAME—APPEAL FROM JUSTICE OF PEACE—JURISDICTION—AMENDMENT OF COMPLAINT. Where a justice court has jurisdiction over the offense, insufficiency of the complaint does not affect the jurisdiction of the court to render a judgment, and by appeal therefrom the jurisdiction follows and attaches to the superior court, authorizing an amendment of the complaint.

INTOXICATING LIQUORS—OFFENSES — PHYSICIANS — UNLAWFUL PRESCRIPTIONS—EVIDENCE—ADMISSIBILITY. In the prosecution of a physician for prescribing intoxicating liquors without good reason to believe that the patient was sick and required the liquor as medicine, evidence is admissible of the number of prescriptions given by the defendant to various persons about the same time, upon the issue as to the defendant's good faith.

SAME—EVIDENCE—SUFFICIENCY. A conviction of a physician for prescribing intoxicating liquors without good reason to believe that the patient was sick and required the liquor as medicine, is sustained by evidence that, during six weeks the defendant gave 673 prescriptions, usually for one quart, and as many as 40 in one day, and made a very superficial examination of the prosecuting witness.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered May 6, 1916, upon a trial and conviction of violating an ordinance regulating the sale of intoxicating liquors. Affirmed.

*E. C. Dailey*, for appellant.

*Wm. A. Johnson*, for respondent.

<sup>1</sup>Reported in 166 Pac. 786.

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Opinion Per FULLERTON, J.

FULLERTON, J.—The city of Everett enacted an ordinance under the following title:

“An ordinance relating to intoxicating liquors; prohibiting the manufacture, keeping, sale, and disposition thereof except in certain cases; the soliciting and taking of orders therefor, or advertising thereof; declaring certain places to be nuisances and providing for their abatement; regulating the keeping, sale, and disposition of intoxicating liquors by druggists and pharmacists; and providing for the search for and seizure and destruction thereof, and of property used in connection therewith; prescribing the forms of procedure and rules of evidence in cases and proceedings hereunder; and fixing penalties for the violation hereof; and declaring an emergency.”

Section 7 of the ordinance provided:

“It shall be unlawful for any licensed physician to issue a prescription for intoxicating liquor except in writing, or in any case unless he has good reason to believe that the person for whom it is issued is actually sick and liquor is required as a medicine. Every prescription for intoxicating liquor shall contain the name and address of the physician, the quality of liquor prescribed, the name of the person for whom prescribed, and address, giving street and house number if there be such, the date on which the prescription is written, and directions for the use of the liquor so prescribed.

“Every physician issuing any prescription for intoxicating liquors shall place a different number on each prescription issued, and shall issue such prescription in duplicate, and shall, within ten days after the issuance of each prescription file one of said duplicates with the city clerk of Everett. Upon conviction a second time of any licensed physician of a violation of the provisions of this section it shall be unlawful for such physician thereafter to write any prescription for the furnishing, delivery or sale of intoxicating liquor; and it shall be unlawful for any druggist or pharmacist to knowingly fill any such prescription written or signed by any physician who has been convicted a second time of a violation of the provisions of this section.” Ordinance No. 1,695.

On March 15, 1916, a complaint was filed before the police court of the city of Everett charging the defendant, Cowles,

with a violation of § 7 of the ordinance, the specific charge being that he did, on a date named, then pretending to be a licensed physician, issue a prescription for one quart of whiskey, to a person named, without having good reason, or any reason, to believe that the person to whom the same was issued was actually sick and required liquor as a medicine. The defendant was arrested on a warrant issued on the complaint, and tried for the offense in the police court, where he was found guilty and sentenced to pay a fine. From the judgment of the police court, he appealed to the superior court of Snohomish county. In that court a new complaint was filed against him. This complaint set forth the same offense as that charged in the complaint filed in the police court; the only material change being that the later complaint charged the defendant with being a licensed physician, instead of "pretending to be a licensed physician," as charged in the original complaint. The defendant was arraigned in the superior court on the new complaint and entered a plea of not guilty thereto. On the issue thus joined, he was tried before a jury, which returned a verdict of guilty. Judgment and sentence was pronounced thereon, from which the defendant appeals to this court.

Noticing the assignments of error in a manner somewhat different from that in which they are presented in the brief, the first is that the provisions of § 7 of the ordinance are not germane to the title of the act, and hence no valid conviction can be had thereunder. We cannot think the contention well founded. The title recites that it relates to intoxicating liquors, and under such a title anything relating to the sale and disposition of intoxicating liquors may be enacted. It is not necessary that every specific proviso contained in the act be mentioned in the title. This is to require the title to be an index to the body of the act, a requirement this court has held unnecessary since early statehood. See *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837, and the cases there collected.

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It is next contended that it was error to permit a new complaint to be filed against the defendant in the superior court and to require him to enter a plea thereto and go to trial thereon. The case of *State v. Hamshaw*, 61 Wash. 390, 112 Pac. 379, is cited to sustain the contention, but the case does not so hold. In that case, a new complaint entitled as in the justice court was substituted for the original complaint, and the accused was compelled to go to trial thereon without arraignment, plea, or opportunity to question its sufficiency, and it was because of this error that the judgment of conviction was reversed. This is made clear by the reasoning of the court, where the following language was used:

“It can be no embarrassment to the superior court or in any way interrupt its procedure, if it is of opinion that the complaint does not charge a crime, or that the defendant should be held for trial, to enter an order of dismissal or order an information filed and, after arraignment and plea, proceed to the trial in an orderly way, thus acquiring jurisdiction in the manner sanctioned by the constitution and the statutes. . . . The right to arraignment and plea upon a sufficient charge, while perhaps not within the letter of the constitution, is within its spirit, and although the conduct of a defendant may be such that a court will hold the right to be waived (*State v. Quinn*, 56 Wash. 295, 105 Pac. 818; *State v. Straub*, 16 Wash. 111, 47 Pac. 227), it has never been held that the formality could be dispensed with over the protest of the party charged.”

The case was explained in the later case of *State v. Bryant*, 90 Wash. 20, 155 Pac. 420, in which it was held error to refuse to allow the prosecution on an appeal from a justice's court to file a new complaint or information against the defendant. The court quoted the extract above given from the case of *State v. Hamshaw*, and stated that it was plain from the language there used that it was not intended to be held that a new information in a criminal case may not be filed in the superior court and the case proceed to trial *de novo* upon the information.

In this connection, it is argued that the complaint filed in

the justice's court failed to state facts sufficient to constitute a crime, and hence that court was without jurisdiction over the offense and the appeal could not vest jurisdiction in the superior court. But without noticing the contradiction involved in the argument, it is enough to say that the jurisdiction of the police court over the crime charged and the person of the defendant did not depend upon the sufficiency of the complaint. This the court had in virtue of the law. And having such jurisdiction, the judgment it rendered was voidable rather than void; enforceable against the defendant until reversed or set aside in some correctory proceeding. *In re Nolan*, 21 Wash. 395, 58 Pac. 222. To set it aside was the purpose of the appeal, and by the appeal jurisdiction followed and attached in the superior court.

A further contention is that the court erred in permitting the prosecution to show the number of prescriptions for intoxicating liquors given by the defendant to various persons, about the time of the giving of the prescription set forth in the complaint. This evidence was competent. One of the issues was whether the prescription which he was charged with unlawfully giving was given in good faith, and the evidence bore upon that question. *Seattle v. Hewetson*, 95 Wash. 612, 164 Pac. 234.

Finally, it is urged that the verdict of the jury is contrary to the evidence. On this question, the record hardly leaves the mind in doubt. It was shown that the defendant had, during the six weeks over which the inquiry extended, given six hundred and seventy-three prescriptions for intoxicating liquor, the usual quantity prescribed being one quart, and that he had issued as many as forty in one day. This, when taken with the very superficial examination he gave the prosecuting witness when the prescription set forth in the complaint was given, was clearly sufficient to justify the jury in their finding.

The judgment is affirmed.

ELLIS, C. J., MOUNT, HOLCOMB, and PARKER, JJ., concur.



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Statement of Case.

[No. 13989. Department Two. July 25, 1917.]

THE STATE OF WASHINGTON, *Respondent*, v.  
JOSEPH McCASKEY, *Appellant*.<sup>1</sup>

CRIMINAL LAW—CONTINUANCE — SURPRISE — INDORSEMENT OF NEW WITNESSES. Under Rem. Code, § 2050, requiring the prosecuting attorney, at the time of filing an information, to indorse the names of witnesses known to him, it is an abuse of discretion to refuse a continuance, needed for the investigation of witnesses, where the prosecuting attorney, one working day before the trial, was by *ex parte order*, permitted to indorse the names of nine additional witnesses known to him at the time of filing the information, and which he had refused to disclose and had apparently concealed until the last possible moment, although they were worthy subjects of investigation and apparently unworthy of belief.

INTOXICATING LIQUORS—PROSECUTION—ISSUES AND PROOF. Upon a prosecution of a druggist for keeping intoxicating liquors named in the information, intended for unlawful sale, it is error to admit evidence of the sale of alcohol, not specified in the information, as a circumstance bearing on the guilt of the accused; especially where the sale of alcohol was made for mechanical purposes in strict compliance with the law.

SAME—INFORMATION—TIME—MATERIALITY. Upon a prosecution of a druggist for keeping intoxicating liquors intended for unlawful sale, on or about the 24th day of March, evidence of the presence of liquors on the premises four days later is admissible, inasmuch as it is provided by statute that the precise time is not a material allegation.

SAME—OFFENSES—STATUTES—SALE. The fact that a person procures alcohol of a druggist by making a false statement, in violation of the statute, does not make the sale, in strict compliance with the statute, unlawful.

INTOXICATING LIQUORS—OFFENSES—INTENT — EVIDENCE — ADMISSIBILITY. Upon the prosecution of a druggist for keeping intoxicating liquors intended for unlawful sale, the quantity and kind of liquor kept on hand by the defendant is material, but not conclusive, to show that he had in possession quantities and kinds in excess of his apparent needs.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered May 25, 1916, upon a trial and conviction of violating the prohibition law. Reversed.

<sup>1</sup>Reported in 166 Pac. 1163.

*Gordon & Easterday* and *Wesley Lloyd*, for appellant.

*Fred G. Remann*, *Geo. M. Thompson*, and *J. W. Selden*, for respondent.

FULLERTON, J.—The appellant, McCaskey, is the proprietor of a drug store situated at Wilkeson, Pierce county, Washington. On March 28, 1916, the prosecuting attorney of Pierce county filed an information against him, charging that, on or about the 24th day of March, 1916, the appellant kept in his drug store "intoxicating liquor, to wit, whiskey, brandy, gin, rum and wine," with intent to unlawfully sell, barter, and exchange the same contrary to the statutes. The appellant was shortly thereafter arrested on a warrant issued on the information, and on April 4, 1916, entered a plea of not guilty thereto. The cause was set for trial for Monday, May 8, 1916. At the time the information was filed, and at the time the plea was entered, the information had indorsed thereon the name of but a single witness. This name subsequently proved to be intended for that of a girl, sixteen years of age, although it was indorsed in the form of a single initial followed by a surname, without anything to indicate the age or sex of the individual intended to be represented thereby. On Friday, May 5, 1916, the Friday preceding the Monday on which the case was set to be tried, the prosecuting attorney procured an *ex parte* order of the court permitting him to indorse on the information, and thereupon did indorse thereon, the names of nine additional witnesses. A copy of the order containing the names of the witnesses was served on the attorneys for the appellant at about three o'clock in the afternoon of the same day.

On Monday, when the case was called for trial, the appellant moved the court for a continuance of at least two days to enable him to investigate the characters of the witnesses whose names had been indorsed on the preceding Friday, supporting the motion by the affidavit of one of his attorneys to the effect that neither the appellant nor his attorneys had

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had an opportunity to inquire into the character and standing of such witnesses, or to learn "what manner of men and women they" were; further averring that the prosecuting attorney had, prior to the time their names were indorsed on the information, refused to give their names, and had at all times refused to furnish them with the addresses of the witnesses. The motion was opposed by the prosecuting attorney, who filed an affidavit to the effect that he had, at the request of one of the appellant's attorneys, furnished him with the names of witnesses at a time prior to the indorsement of their names on the information, in so far as they were then known to the prosecution. The matter was made the subject of further inquiry in which oral testimony was taken. This it is unnecessary to set forth at length. While it developed a misunderstanding between counsel, it seems to us to support the appellant's contention that he was not informed, prior to the time the names of the witnesses were indorsed, whom the prosecution expected to call in support of the information. The inquiry developed the fact, also, that the witnesses intended to be called were, with the exception of two, known to the prosecuting attorney at the time the information was filed. On this subject, the prosecuting attorney testified (we quote from the statement of facts):

"I have known at all times since the filing of this information what witnesses were to be called upon the part of the state, but I did not, until a few days ago, know the names of the witnesses Peretti and Currington. I employed them through the Thiel Detective Agency in Seattle, and suppose I could have obtained their names from that agency. I had my own reasons for not indorsing them; reasons I deem sufficient."

The court overruled the motion, and proceeded with the trial, which resulted in a verdict of guilty. From the judgment and sentence pronounced upon the verdict, this appeal is prosecuted.

The error first assigned is the refusal of the court to grant the motion for a continuance. It seems to us that, in fairness

to the defendant, this motion should have been granted. The statute (Rem. Code, § 2050) provides in express terms that the prosecuting attorney, at the time he files an information against an accused person, shall indorse thereon the names of the witnesses known to him at the time of filing the same, and while we have held that the time when the names of witnesses shall be indorsed is largely a matter of discretion and that, in the absence of a showing of an abuse of such discretion or that some substantial injury has resulted to the defendant, a conviction will not be reversed for a disobedience of the rule of the statute (*State v. Le Pitre*, 54 Wash. 166, 103 Pac. 27), it has never been held that the procedure was an absolute right of the prosecution. The rule of the statute has a purpose. This purpose is to give the defendant an opportunity to inquire into the habits, character, and standing of the witnesses by whom the accusation against him is to be proven, and to show, if he can, that these are such as to render the witnesses in the eyes of their neighbors and acquaintances unworthy of belief. To prevent miscarriages of justice, great liberality has been exercised by the courts in allowing the names of witnesses to be indorsed on an information, but this liberality has never been, and should not be, carried to the extent of working an injustice to the defendant. One cannot read this record without being convinced that there was a studied attempt to keep the names of these witnesses from the defendant until the latest possible moment. There intervened but one working day between the time their names were indorsed on the information and the time the defendant was required to confront them at his trial. They were considerable in number and seemingly the very short time the defendant requested to inquire into their characters was not unreasonable. We think it an abuse of discretion to refuse it.

The subsequent testimony, moreover, showed that certain of these witnesses were worthy subjects of investigation. Three of them were mature women and another, as we have

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said, was a young girl. Two of the women, Mrs. Swanson and Mrs. Lavalley, went from Tacoma to the town of Wilkeson, where the business of the defendant was conducted, on the evening of March 21, 1916, arriving there at about 7:30 p. m. They entered the appellant's place of business shortly after their arrival and sought to buy intoxicating liquor. This was refused them; whereupon they asked for alcohol, making the admittedly false statement that they desired it for an alcohol stove. The clerk whom they approached told them that he had wood alcohol which could be used for that purpose, and proffered them that. They informed him that they did not desire that kind because of its disagreeable odor. He then sold them a pint of grain alcohol for which they signed a regular register, again making the false statement that it was intended for mechanical purposes. On Friday, March 24, 1916, Mrs. Swanson again went to the town of Wilkeson, taking with her a Mrs. Bessie Hunt and the young girl. The state's version of this trip may best be told by the witnesses themselves. Mrs. Hunt testified:

"My name is Bessie Hunt. Mrs. Swanson, —, a girl of sixteen years of age, and I went to Wilkeson on Friday, the 24th day of March. We reached Wilkeson at about 8:30 p. m. We went to Mr. McCaskey's drug store. I was employed by Mrs. Swanson to go with her. She did not tell me what she wanted me to do, but told me to come with her to Wilkeson. At the drug store Mrs. Swanson bought a bottle of 'Monogram' whiskey. I asked the clerk if I could buy gin and he said, 'Yes.' I bought two bottles of gin from him and paid \$1 for them. The druggist's wife was in the store. She said her husband, Mr. McCaskey, was upstairs. Mrs. Swanson asked the price of champagne. The clerk told her it was \$5. He walked behind the prescription case and brought out a bottle of wine. Mrs. Swanson asked him the price and he said \$2. It was Virginia Dare. The wine was setting out on the shelves so everybody could see it. Mr. McCaskey was standing beside the clerk when the purchase was made. Mrs. Swanson handed the money to the clerk rather than laying it on the counter. Myself, Mrs. Swanson and — — [the young girl] ate dinner the night of the 24th

at the city restaurant in Wilkeson. We had a box in the rear of the restaurant. Mrs. Swanson ordered beer and a man went out and brought in several bottles. While we were eating dinner a number of men conversed with us. One of them tried to kiss the —— girl. Some of them tried to take liberties with us.”

The young girl testified:

“My name is — —. I am sixteen years of age. I know Mrs. Swanson and have known her for about a year. She came down to the house and asked my mother if she could take me on a trip and my mother consented and on Friday, March 24, Mrs. Swanson, Mrs. Hunt and I went to Wilkeson. We arrived there about 8 o'clock. We went to McCaskey's drug store. Mrs. Swanson asked the druggist's clerk, Mr. Battiste, for some whiskey. He sold her a bottle of 'Monogram' whiskey. There were some men in there playing the phonograph. Mrs. Hunt then bought two and one-half pints of gin, for which she paid the clerk \$1. Mrs. Swanson paid the druggist \$2.50 for the bottle of whiskey. The clerk got the bottle from the shelf at the back of the store. About 11 o'clock that same evening we went back a second time and Mrs. Swanson purchased a bottle of whiskey from Mr. McCaskey. I was not employed by any one. During dinner at the City restaurant some of the men got 'funny' with Mrs. Hunt and tried to take liberties with me. I didn't drink any beer there.”

Witnesses on the part of the appellant, reputable in so far as the record shows, who saw them in the restaurant mentioned and at the time they visited the appellant's place of business, testified that the women as well as the young girl were intoxicated, and that their appearance was that of lewd women. There was a denial by all of the persons involved and by uninterested witnesses that any intoxicating liquor was procured by the women at the appellant's place of business on either of the occasions to which they testified.

Comment would seem to be unnecessary. Manifestly enough is shown to make it not at all improbable that, if the appellant had been given an opportunity to fully investigate the characters of these witnesses, he could have brought such evidence before the jury as to convince them that they were

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not of such a character as to be worthy of belief. It may not be improper to remark, also, that while zeal in the prosecution of offenders against the laws is always commendable, there are bounds beyond which it should not pass. The impropriety, if not crime, of sending a girl sixteen years of age on a mission of this sort ought to be apparent to the most zealous. If the example is followed, it will be strange indeed if the state is not called upon to enforce the laws against contributing to the delinquency of minors.

The court admitted the evidence relating to the sale of the alcohol, and in his charge to the jury told them that they might consider it as a circumstance bearing upon the guilt of the defendant. The defendant complains of this, we think justly. In the first place, the keeping of alcohol with intent to dispose of the same unlawfully was not within the issues. The prosecution specifically enumerated the intoxicating liquors which the defendant kept with criminal intent, and alcohol is not among the enumerated kinds. In the second place, no offense was committed by the defendant by the sale. It was made on his part in strict compliance with the law. The crime committed was by the state's witnesses. The law provides (Initiative Measure No. 3; Laws 1915, p. 14, § 21; Rem. Code, § 6262-21) that it shall be unlawful for any person to make a false statement to a physician, druggist or pharmacist for the purpose of obtaining intoxicating liquor or alcohol, and here confessedly these witnesses did obtain this alcohol by a false statement. Their crime cannot reflect back upon the druggist. Since he complied with the statute, he is innocent, however much the procurers of the alcohol may be guilty.

Since the judgment must be reversed and a new trial awarded for the errors indicated, it is necessary to notice certain other claims of error made by the defendant, as the questions will probably recur at the second trial. The information, it will be observed, fixes the time of the offense as "on or about the 24th day of March, 1916." The evidence

disclosed that on March 28, 1916, certain of the police officers of Pierce county made a search of the defendant's premises and seized a quantity of intoxicating liquors he then had in stock. The officers were permitted to testify, over the objection of the defendant, as to the result of the search, and the state was permitted to introduce the liquor seized in evidence. The defendant contends that the admission of this evidence was error, arguing, first, that presumptions do not run backwards, and hence proof of possession of liquors on the 28th day of March is not evidence that liquors were possessed four days earlier; and second, that, since the law gives to druggists the right to possess intoxicating liquors without limitation as to kind or quantity, the druggist is alone the judge as to the kind or quantity he shall possess, and it is not a question that may be submitted to the varying ideas of jurors. As to the first objection, it is a sufficient answer to say that, in this state, it is provided by statute that the precise time at which a crime was committed need not be stated in an information, but it may be alleged to have been committed at any time prior to the filing of the information and within the statute of limitations. Since time is not a material allegation, proof is competent when within the latitude of the statute, even though the information may purport to fix the precise time and even though the proofs may show that the actual time of the commission of the offense was later than the time fixed. *State v. Williams*, 13 Wash. 335, 43 Pac. 15; *State v. Anderson*, 30 Wash. 14, 70 Pac. 104; *State v. Osborne*, 39 Wash. 548, 81 Pac. 1096. There are, of course, exceptions to this rule. These, however, have no pertinency here and need not be pointed out.

Noticing the second objection, we think it may safely be conceded that a druggist is the sole judge of the kind and quantity of intoxicating liquor the needs of his business may require, and that he is not to be molested so long as he intends to devote it to his legitimate trade. But this is hardly the question here presented. It must be remembered that the



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defendant is charged with keeping intoxicating liquors with the intent to unlawfully sell, barter, and exchange the same. It can readily be seen that to prove this fact the quantity and kind of intoxicating liquors the defendant kept on hand may be a material link in the chain of circumstances tending to show his guilt. If, for example, it were shown that an illegitimate traffic in liquors was being carried on in that vicinity, and that the defendant had made illicit individual sales, it would tend to support the charge that the defendant kept intoxicating liquors for illegitimate traffic to show that he had in his possession quantities and kinds in excess of his apparent needs. The fact alone, it may be conceded, would not be conclusive. A druggist, like any other merchant, may overstock in a particular commodity. What we hold is that it is a circumstance competent to be shown in connection with other facts, to sustain the issue which the jury are called upon to determine.

Because of the errors indicated, the judgment is reversed and a new trial awarded.

ELLIS, C. J., MOUNT, PARKER, and HOLCOMB, JJ., concur.

[No. 14000. Department One. July 25, 1917.]

THE STATE OF WASHINGTON, *Respondent*, v.  
JOHN E. CLANCY, *Appellant*.<sup>1</sup>

INTOXICATING LIQUORS—OFFENSES—KEEPING LIQUORS—PUNISHMENT—STATUTES. Rem. Code, § 6262-5, authorizes fine and imprisonment, as well as an abatement of the premises, for unlawfully keeping intoxicating liquors for sale, the one penalty being directed against the premises and the other against the violator; in view of the fact that it makes such act unlawful and provides for abatement of the nuisance "upon conviction of any violation of the act," and for the giving of a bond, conditioned to pay all "fines, costs, and damages" that may be assessed; since § 6262-5, recognizes that a fine may be imposed for its violation without specific mention of the extent of the fine, and the amount is therefore controlled by § 6262-31, which provides that upon conviction of any violation of the act where the punishment is not specifically provided for, there may be imposed a fine of not less than \$50 nor more than \$250, or imprisonment for not less than ten days, nor more than three months, or both such fine and imprisonment.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered October 31, 1916, upon a trial and conviction of keeping intoxicating liquors for unlawful sale. Affirmed.

*Vanderveer & Cummings* and *H. McC. Billingsley*, for appellant.

*Alfred H. Lundin*, *John D. Carmody*, and *Joseph A. Barto*, for respondent.

MORRIS, J.—Appellant was convicted under an information charging:

"He, said John Clancy, in the county of King, state of Washington, on the 25th day of August, 1916, while occupying a building known as 'The Meadows' and also known as 'Clancy's Road House,' situate in King county, state of Washington, did then and there knowingly, wilfully and unlawfully permit intoxicating liquor, to wit, two hundred

<sup>1</sup>Reported in 166 Pac. 778.

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ninety-eight quarts of beer, three pints of whiskey, one pint of beer, and three pint bottles of whiskey partly filled, to be kept on said premises, with intent to sell, barter, exchange, give away, furnish and dispose of the same therein and thereon."

Upon plea of guilty, judgment was entered that appellant be confined in the King county jail for a period of twenty days, and pay a fine of \$100. The appeal is based upon appellant's contention that, under the information, the only judgment that could be entered was one of abatement, and that there is no authority in law for the imposition of a fine and imprisonment for the crime charged in the information. This contention is based upon the argument that the information was filed under § 5 of chapter 2 of the Laws of 1915, p. 8 (Rem. Code, § 6262-5), known as initiative measure No. 3, providing, in part, that it shall be unlawful for any person occupying any building to knowingly permit intoxicating liquors to be kept on the premises with intent to sell, give away or otherwise dispose of the same, declaring all such premises to be a nuisance, and providing for abatement upon conviction of the owner or occupant of any violation of the act. It is further provided that, upon ordering an abatement of such nuisance, the court shall order the premises closed until the owner or occupant give bond conditioned that intoxicating liquor shall not thereafter be unlawfully kept or disposed of upon the premises and that the giver of the bond shall pay all fines, costs and damages that may be assessed against him; and in the event of conviction before a justice of the peace of any violation of the act, no appeal being taken, an information may be filed in the superior court of the county in which the conviction was had to abate the nuisance and a certified copy of the record of the justice of the peace showing such conviction shall be competent evidence of the existence of such nuisance. But one construction can be placed upon these provisions, and that is that, upon the conviction of any violation of this section, the declared nuisance may be

abated and a fine, costs and damages assessed upon the person found guilty. It would be meaningless to provide for the giving of a bond to pay all fines and costs if none could be assessed. The provision for filing the record of the conviction before a justice of the peace in the superior court and there ordering an abatement is a further indication that the convicted person could be fined below and no order of abatement entered until in the subsequent proceedings in the superior court. Violators of this section are thus subject to two penalties, one directed against the premises in which the violation occurs, and the other directed against the violator.

Section 31 (Rem. Code, § 6262-31) of this act provides that, upon conviction of any violation of the act where the punishment is not specifically provided for, any person found guilty may be punished by a fine of not less than \$50 nor more than \$250, or by imprisonment in the county jail for not less than ten days, or more than three months, or by both such fine and imprisonment. Appellant attempts to get around § 31 by his plea that it cannot apply to any violation of § 5, because such section specifically carries its own punishment in providing for an abatement of the nuisance. This argument is not well founded. Section 5 clearly recognizes that a fine may be imposed for its violation but no specific mention is made of the extent of such fine nor how it shall be enforced. Hence, not making specific provision for the punishment referred to we must look to § 31 to determine what that fine is and we have a clear inclusion of violations of § 5 as punishable by fine, imprisonment or both. It may be as contended for by appellant that the provision for abatement as found in § 5 is a specific punishment, but whether this is true or not it does not follow that having provided for punishment of this character other punishment provided for in the chapter may not be imposed. It clearly is the legislative intent as expressed in § 5 to provide for two penalties, one the abatement of the offending premises, the other the punishment

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of the offending person, leaving the character and the extent of the punishment against the offending person to the subsequent section.

The judgment is affirmed.

ELLIS, C. J., CHADWICK, and MAIN, JJ., concur.

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[No. 14050. Department Two. July 25, 1917.]

PUGET SOUND HARBOR NO. 16 OF THE AMERICAN ASSOCIATION  
OF MASTERS AND PILOTS OF STEAM VESSELS *et al.*,  
*Appellants*, v. AETNA ACCIDENT & LIABILITY  
COMPANY *et al.*, *Respondents*.<sup>1</sup>

INJUNCTION—WRONGFUL INJUNCTION — ACTION ON BOND — ATTORNEY'S FEES—CONDITION PRECEDENT. Attorney's fees incurred in an injunction suit cannot be recovered in an action upon the injunction bond when the injunction was not wrongful in its inception, and no motion was made to dissolve it when the necessity for it ceased, and it was not dissolved until judgment of dismissal of the action on final hearing.

Appeal from a judgment of the superior court for King county, Webster, J., entered October 18, 1916, dismissing an action upon a bond, notwithstanding the verdict of a jury rendered in favor of the plaintiff. Affirmed.

*George A. Custer*, for appellants.

*James B. Murphy* and *George E. Mathieu*, for respondents.

FULLERTON, J.—The appellants in this action sued the respondents upon an injunction bond, to recover for a liability incurred for the services of an attorney who was employed to defend an action in which the issuance of an injunction was a part of the relief sought. At the trial, the court submitted the issues to a jury, which returned a verdict in the appellants' favor. Thereafter the court sustained a motion for judgment notwithstanding the verdict, and dis-

<sup>1</sup>Reported in 166 Pac. 785.

missed the action. This appeal is from the judgment of dismissal.

The pertinent facts are these: The respondent American Association of Masters, Mates & Pilots is a national fraternal organization. The appellant Puget Sound Harbor No. 16 is a subordinate chapter or lodge of the national organization, and the other plaintiffs were, during the year 1914, the local officers of the subordinate lodge, charged with its business management and the custody of its funds. In December of the year named, the officers of the local lodge attempted to induce the membership of the local lodge to withdraw its connection with the national association and form a new association disconnected from the national association, and take with them the property and funds of the local association. They persisted in this course notwithstanding the written protest of a minority of the lodge sufficient in number, according to the by-laws of the order, to prevent such a withdrawal. The national association, learning of these facts, and acting through its executive committee, removed these officers, expelled two of them from the organization, and suspended the others, for limited periods; and, in their stead appointed other members then in good standing as temporary officers of the local lodge. The removed officers refused to recognize the action of the executive committee, refused to surrender their offices to the men appointed, and refused to turn over to their custody the property and funds of the local lodge, although it seems not to have been disputed that the executive committee were acting within their rights as measured by the existing constitution and by-laws of the association. The national association thereupon began an action in the superior court of King county to enforce the orders of its executive committee and to prevent the removed officers from withdrawing the funds of the lodge, on deposit with a local bank, or disposing of the funds in a manner inconsistent with the laws of the association. On filing the complaint, the plaintiffs asked for a restraining

order pending a hearing for a temporary injunction. The restraining order was issued by the court and a time fixed for a hearing on the question of the issuance of a temporary injunction pending the final disposition of the action. This hearing was had after notice and a temporary injunction issued. Prior to the time the action was called for hearing on the merits, the national convention of the organization met and affirmed the action of the executive committee. Later on, the local lodge, by a deciding vote, agreed to remain in the general organization and abide by its laws and regulations, voting at the same time to reinstate the expelled members. These facts were set up by an amended and supplemental pleading, and at the trial on the merits, were duly made to appear. The principal issue tried at the hearing on the merits was the validity of the action of the local lodge in reinstating the expelled and suspended members; the necessity for the injunctive relief, in so far as it related to the custody and control of the finances of the local organization having ceased by the action of that organization. This issue the court decided in favor of the expelled and suspended members, entering a judgment which had the effect of dissolving the temporary injunction. After the cessation of the necessity for the temporary injunction relating to the funds of the association, no motion to dissolve was made, nor was any other action taken leading to its dissolution by the defendants prior to the trial upon the merits.

The present action was begun after the final determination of the principal action mentioned. As instituted, it was to recover the attorney's fees expended and incurred in the defense of the principal action. The appellants contend that the sole purpose of the action was to procure injunctive relief, and since this failed at the hearing upon the merits, that they are entitled to recover upon the bond the reasonable attorney's fees expended and incurred in defeating the injunction. They have filed a somewhat extended argument in support of their position, but we have found it unnecessary

to follow them. The issue, to our minds, is confined to a more narrow compass. It is not the rule that attorney's fees may be recovered in every case wherein a temporary injunction is issued and is not made perpetual at the final hearing of the action. To permit of such a recovery, the issuance of the injunction must have been wrongful in its inception, and it must have been dissolved because of its wrongful issuance. *Berne v. Maxham*, 82 Wash. 235, 144 Pac. 23; *Anderson v. Provident Life & Trust Co.*, 26 Wash. 192, 66 Pac. 415; *Mann v. Becker*, 90 Wash. 534, 156 Pac. 396.

Here, as we read the record, this injunction was not wrongfully issued. The appellants, in violation of the laws of the order of which they were members, were seeking to withdraw from the order and take with them funds and property which they were not entitled to take. This entitled the plaintiffs in the action to injunctive relief. The necessity for the injunctive relief may have ceased when the lodge decided to rescind its action and voted to remain in and abide by the laws and rules of the order, and it may be that the plaintiffs wrongfully pursued the individual defendants longer than the law and the facts of the case warranted; but neither of these considerations shows that the injunction was wrongful in its inception. Another rule is that attorney's fees cannot be recovered for the wrongful issuance of an injunction when no motion is made for its dissolution prior to the final hearing upon the merits of the action. This rule may be without application to a case where the injunction is issued upon notice and after a hearing and subsequently proves wrong in its inception, but the principle is applicable to a case where the original issuance is rightful and the necessity therefor ceases because of the action of the party against whom the injunction is issued. So here, since the injunction was not wrongful in its inception, the appellants against whom it was issued should have moved against it when the necessity for it ceased instead of waiting the final termination of the action, if they



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anticipated suing upon the bond. In such a case, had the motion been denied, they might have recovered the attorney's fees incurred in prosecuting the motion and damages for any injury suffered by them by reason of its longer continuance; but having suffered it to remain unchallenged until the conclusion of the action, no such fees or damages are recoverable. *Mann v. Becker, supra.*

The judgment is affirmed.

ELLIS, C. J., MOUNT, HOLCOMB, and PARKER, JJ., concur.

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[No. 14052. Department One. July 25, 1917.]

S. L. McCLELLAN *et al.*, Appellants, v. FRANK SCHWARTZ,  
*as Alaska Junk Company, Respondent.*<sup>1</sup>

MASTER AND SERVANT—EXISTENCE OF RELATION. The purchaser of junk, who was injured by the fall of hoisting tackle on the seller's premises, where he went in his own interests to help the seller's servants fill the order, does not in any sense stand in the relation of a servant to whom the seller owed a duty to furnish safe appliances.

NEGLIGENCE — PRESUMPTIONS — RES IPSA LOQUITUR. Where the cause of the fall of hoisting tackle was not shown, and the appliance was not shown to be defective, the defendant is not put to his proof upon the doctrine of *res ipsa loquitur*, which requires that the offending instrumentality be identified.

Appeal from a judgment of the superior court for King county, Tallman, J., entered July 10, 1916, in favor of the defendant, upon granting a nonsuit, in an action for personal injuries. Affirmed.

*Israel & Kohlhasse*, for appellants.

*Trefethen & Findley*, for respondent.

CHADWICK, J.—Appellants bring this action to recover damages for "personal injuries sustained by reason of the faulty construction or maintenance of appliances and in-

<sup>1</sup>Reported in 166 Pac. 783.

strumentalities consisting of beams or planks and blocks and tackle maintained and operated in the course of respondent's business."

Respondent is a dealer in junk in the city of Seattle. He occupies a building of three stories and basement. There are sets of windows in each story, one above the other. Beneath them is an area window in the basement which extends above the level of the sidewalk. It is described as being about three and one-half feet long by twenty to twenty-four inches wide. Out of the upper or third story window a beam had been extended, to which blocks and tackle had been rigged for hoisting stock in and out of the building.

Appellant S. L. McClellan, who is a blacksmith and wagon repairer maintaining a place of business in Seattle, went to respondent, with whom he had been accustomed to deal, to buy some second-hand rubber. After negotiating and agreeing upon amounts and prices, respondent, who was busy, told two Japanese in his employ to go with appellant to the basement and to assist him in selecting the rubber. This was done. A large pile of rubber was placed under the area window, and the block was attached. One of the Japanese remained in the basement to guide and push the load out of the window, and the other went out on the sidewalk and started to pull the haul line. The load, which was too large to pass through the window easily, stuck. The Japanese who was hauling the line said to appellant, "Give me a pull." Appellant,

"walked over and took hold of the rope with him, and we were standing off at an angle, about I guess ten or eleven degrees from where it was fastened up overhead, and the Jap says "Let us get straight under it, it will pull easier." All right we went straight under it, pretty soon the Jap up overhead on the second story window, he had hold of this rope also, well they were talking Japanese back and forth to one another, and finally this little Jap up above he gave a yell out of him— Q. Just before he gave a yell where was the rubber, on the end of the tackle at the time he hollered? A.

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It was right up to the opening where the window opened and the Jap in the basement was trying to shove it out, and this Jap up above gave a yell out of him and this rope slacked away quick and I jumped one way and this Jap jumped the other."

Appellant was knocked senseless and removed to the office room of respondent. When he recovered consciousness, he asked respondent "how he had the block and tackle fastened to give way that way." Respondent replied, "it was not the block and tackle, . . . it was the plank flew off and hit me."

No witnesses were called to show the character of the hoisting apparatus—whether structurally weak or strong. Appellant himself, who had gone there frequently to buy goods, was no stranger to the premises. He says that, when requested to "give a pull," he looked at the tackle; that it was rigged with a  $\frac{3}{4}$  or  $\frac{7}{8}$  rope, and 5 or 6 inch sheave and "looked good to him." That he was competent to form an opinion, is evident from his own testimony. He had a similar appliance in his own shop and was accustomed to raise great weights, such as automobiles and automobile bodies with it.

This being the state of the evidence, and it not being made to appear, except by inference, that the accident occurred through any fault or defect in the block and tackle or its rigging, the court entertained a motion for a nonsuit, and thereafter entered a judgment of dismissal.

Appellant predicates his right to have the judgment reversed upon two theories.

He first contends, if we follow the argument advanced in his brief, that there was some relation of master and servant existing, and that respondent owed a duty to appellant to furnish safe appliances, that the breaking of the appliance raises a presumption of negligence, that a *prima facie* case was made out, and respondent should have been put to his proofs. A careful review of the evidence will not sustain the conclusion that respondent requested appellant to do

anything that might or should have been done by him. On the contrary, it is clear that appellant was acting in his own behalf. The so called request was no more than a suggestion that appellant go down and help the Japanese pick out junk to fill the order. Appellant was serving his own interest, and, if not to get the better of the trade, to get full value for his money. He testifies that the Japanese "did not get around the way I thought they ought to," and:

"They started in rolling rubber over, and there was a lot of rubber on top old ragged stuff, that was not hardly fit enough to throw in the sewer. I called him Charlie, I says, 'I don't want that' and so I picked up a piece and I says, 'I want rubber like that' so I ran my hand in my pocket and gave one of them a tip of twenty-five cents and the other fifteen, that was all the change I had in my pocket. I did that to encourage them, so that they would pick out the rubber for me. Gave it to them right away, I wasn't there over fifteen minutes. It was because they were not picking out the best rubber down there, that I gave them the tip, thinking they would pick out the best rubber. . . ."

It can hardly be said that appellant was acting upon the request or under the implied direction of the respondent when, by his testimony, he did no more than direct the Japanese in his own interest, even to the extent of stimulating their interest in him by a voluntary donation.

There is another reason for rejecting this theory. That is, the accident is not attributable to anything connected with the picking out of the rubber. That had been done. Appellant had assumed the attitude of an onlooker when requested by the Japanese to "give a pull."

The main reliance of the appellant is in the doctrine of *res ipsa loquitur*. Many cases are cited where the doctrine has been applied. But authority cannot be treated as a fetich. Negligence cases, more than any other, depend upon the facts of the particular case. As we have often said, each case is one of original inquiry and the facts speak the law. This is especially so where the doctrine of *res ipsa loquitur*

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is invoked, for that doctrine rests primarily in circumstances. The doctrine is, in its application, no more than proof by circumstantial evidence. *Frescoln v. Puget Sound Traction, Light & Power Co.*, 90 Wash. 59, 155 Pac. 395; *Anderson v. McCarthy Dry Goods Co.*, 49 Wash. 398, 95 Pac. 325, 126 Am. St. 870, 16 L. R. A. (N. S.) 931.

The fairest, and at the same time the strongest, statement in favor of the position of the appellant is to be found in *Graaf v. Vulcan Iron Works*, 59 Wash. 325, 109 Pac. 1016.

“Common observation and experience teach that sound appliances do not break when employed in a proper manner and in the use for which they were designed.”

Because of the circumstantial character of the testimony, the doctrine is applied sparingly. *Anderson v. McCarthy Dry Goods Co.*, *supra*. Hence it has been held that one charged under the doctrine of *res ipsa loquitur* is not to be put to his proof unless there is some showing of cause—careless construction, lack of inspection, or misuser. The cause of the accident—the offending instrumentality—must be identified before one charged is put to answer.

The rule applied to a similar state of facts is accurately stated in *Johnson v. Columbia & Puget Sound R. Co.*, 74 Wash. 417, 133 Pac. 604. There the cause was not shown, nor was it shown that the appliance was defective. The court held, just as it was held in *Cole v. Spokane Gas & Fuel Co.*, 66 Wash. 393, 119 Pac. 831, that it is a showing of facts sufficient to sustain a presumption of negligence, and not the fact of injury, that sets the doctrine in motion. The reporter gathered the rule of the cases and has well stated it in the syllabus to the *Johnson* case, *supra*.

“There can be no recovery on the ground of *res ipsa loquitur*, where there was nothing to show what caused the iron to slip and no proof of negligence; since it was necessary for plaintiff to show that it was caused by defective machinery or some extraordinary or negligent act under the control of the defendant.”

See, also, *Lewinn v. Murphy*, 63 Wash. 356, 115 Pac. 740, Ann. Cas. 1912D 433; *Samardege v. Hurley-Mason Co.*, 72 Wash. 459, 130 Pac. 755.

Appellant did not account for the cause of the accident, nor did his testimony reveal circumstances from which it can be reasonably inferred. The judgment of dismissal was properly entered.

Affirmed.

ELLIS, C. J., MORRIS, and MAIN, JJ., concur.

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[No. 13633. Department One. July 25, 1917.]

CHEHALIS COAL COMPANY, *Respondent*, v. E. M. LAISURE,  
*Appellant*.<sup>1</sup>

APPEAL—REVIEW—FINDINGS—NECESSITY. Findings of fact are unnecessary in a suit in equity, and on trial *de novo* on appeal, the supreme court must look to the evidence.

JUDGMENT — VACATION — DIRECT ATTACK — EVIDENCE. A suit in equity to set aside a judgment is a direct attack in which evidence *de hors* the judgment roll is admissible.

SAME—VACATION—AFFIDAVITS OF MERITS — NECESSITY. The rule that equity will set aside a judgment absolutely void for lack of service on evidence aliunde the record, without a showing of merits, does not apply to a judgment that was simply voidable, because prematurely entered without notice, after appearance by the defendant during the pendency of a motion, in which case it must be shown that the defendant has a valid defense on the merits and that there is substantial evidence to support the allegations.

SAME. In proceedings under the statute to set aside a voidable judgment for mistake or surprise under Rem. Code, § 303, or for irregularity or fraud in obtaining it under § 464, it is necessary to meet in addition the provisions of § 469, requiring an adjudication that there is a valid defense.

SAME—LIMITATIONS—DISCOVERY OF FRAUD. Where it is sought to set aside a judgment for fraud and irregularity in obtaining it, for grounds specified in Rem. Code, § 464, it is a general rule that the parties must bring themselves within the terms and conditions of

<sup>1</sup>Reported in 166 Pac. 1158.

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the statute; but the application may be made by an independent suit in equity, where a failure to discover the ground within the time limited by the statute is traceable to fraud or concealment of the adverse party.

**SAME — VACATION — FRAUD — EVIDENCE — SUFFICIENCY.** Where a judgment for personal injuries was taken without notice after appearance by the defendant and during the pendency of a motion, by substituted attorneys for the plaintiff who had no notice of the defendant's appearance, and the original attorneys for plaintiff had not informed the client of the defendant's appearance, the plaintiff was guilty of fraud in procuring the judgment, since he was chargeable with the knowledge of his original attorneys.

**SAME—VACATION—MERITORIOUS DEFENSES—COMPLAINT—SUFFICIENCY.** A complaint in an action to vacate a default judgment for personal injuries sufficiently sets forth that the defendant has a meritorious defense, where many material allegations on which the judgment was based are specifically denied and in detail alleged to be untrue to the knowledge of the party making them.

**APPEAL—DECISION—REMAND.** In an action to set aside a judgment, in which the plaintiff failed to introduce substantial evidence to show that he had a meritorious defense, owing to incoherence in the decisions of the supreme court, the case will be remanded for a new trial.

**APPEAL—DECISIONS APPEALABLE—VACATION OF JUDGMENT.** The supreme court has jurisdiction of an appeal from a judgment in an independent action in equity vacating a judgment for fraud in its procurement which was not discovered until after the expiration of one year limited by statute for proceeding in the original case, since it cannot be treated as a proceeding in the original case from which no appeal would lie.

CHADWICK, J., dissents in part.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered January 14, 1916, upon findings in favor of the plaintiff, in an action to open a default judgment. Reversed.

*Thacker & Hancock and Hayden, Langhorne & Metzger,*  
for appellant.

*W. A. Reynolds and O. J. Albers,* for respondent.

ELLIS, C. J.—Action to set aside a judgment for irregularity and fraud in its procurement.

On August 30, 1911, E. M. Laisure commenced an action for personal injuries against the Chehalis Coal Company, by serving a complaint signed by his attorneys, Owens & Finck, of Seattle, and an unsigned copy of the summons. On September 19, 1911, the coal company, through its attorneys, Reynolds & Stewart, served a motion on Owens & Finck as attorneys for Laisure to make the complaint more definite and certain and for a bill of particulars. Service of these motions was accepted in writing by Owens & Finck on September 19, 1911. Sometime subsequently, Owens & Finck removed from the state of Washington, and Laisure secured through a third party the original summons and complaint. He was not advised by his former attorneys, and did not know, that the coal company had served the motions, nor that it had in anywise appeared in the action. On April 19, 1912, Laisure caused the summons and complaint to be filed in the superior court for Lewis county. On April 25, 1912, he petitioned the superior court of Lewis county to have Thacker & Hancock, of Chehalis, substituted as his attorneys in the place of Owens & Finck, and on the same day the court entered an order making the substitution. On April 29, 1912, Thacker & Hancock presented a motion for an order of default against the coal company for want of an appearance. This motion was supported by the affidavit of Floyd M. Hancock, one of Laisure's attorneys, that the coal company had been duly, legally, and personally served with summons and complaint; that, although twenty days had elapsed since the service, the coal company had not answered, demurred, or moved against the complaint nor appeared in the action and was then in default. On the same day, April 29, 1912, the court entered an order of default against the coal company. On January 25, 1913, after a trial to the court, a superior judge from another county presiding, the court entered findings in favor of Laisure and signed a judgment against the coal company in favor of Laisure for \$3,500. The judgment was filed and entered on February 13, 1913. All of these things were done



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without any notice to, or knowledge on the part of, the coal company or its attorney. About September 11, 1915, the attorney for the coal company fortuitously discovered from the record in the clerk's office that the judgment had been entered against his client. Till then both he and his client seem to have assumed that the action had been abandoned.

On September 20, 1915, this action was commenced by the coal company as plaintiff against Laisure as defendant to set aside the judgment entered in the original action. In the complaint most of the foregoing facts are set out and it is alleged that defendant fraudulently withheld from his attorneys, Thacker & Hancock, and from the court all knowledge of any appearance by the coal company. It is further alleged that:

"Plaintiff further avers that the defendant well knew the allegations of his complaint in said action No. 4886, that there were no timbers or props present in the working place of plaintiff's mine as alleged by him were false, and that timbers were at all times maintained in abundance in and about said mine for the use of its miners and workmen and in particular for the use of defendant. Plaintiff further avers that it is not true as alleged by defendant that he made complaint to plaintiff's superintendent or to plaintiff that the roof of its said mine was dangerous or that he requested to have timbers furnished him which were not furnished; or that he relied upon any promise or assurance of plaintiff or its superintendent that it was safe, or that timbers would be furnished which were not furnished for his use. Neither is it true as alleged that plaintiff or its superintendent knew or had cause to know the roof of its mine to be dangerous or unsafe on the 17th day of January, 1911, or at any other time while defendant was working in said mine; or that same was at any time unsafe while defendant was working therein, and he well knows that at no time was any request made by him for props or timbers for use in said mine that same were not furnished and at hand for his use. Plaintiff further avers that any caving or falling of the roof or any other part of its mine upon defendant, if the same occurred, was not due to any carelessness or negligence on the part of plaintiff or its superintendent as alleged by defendant in his complaint as he well

knows, and that any injury or hurt alleged to have been sustained by him because of any defect or want of safety in plaintiff's mine was and is simulated and exaggerated and not because of any fault or negligence upon the part of plaintiff or its superintendent and he well knows that the allegations of his complaint in that behalf are false and that the falsity thereof would have been proved and that plaintiff was in no wise liable therefor had notice been given of the hearing of said cause and opportunity given to the plaintiff to make defense in said action against rendition of said judgment."

The answer is a traverse of the allegations of the complaint.

The following is all of the evidence offered to show that plaintiff, had it been permitted to defend the original action, would have presented a meritorious defense to that action:

Mr. Reynolds testified on direct examination as follows:

"Q. Was there anything else (besides the fact, which he had learned, that Owens & Finck had been disbarred) that you found out that led you to discontinue your investigations of the records in the clerk's office?"

Objection to the question was overruled.

"A. I investigated all of the facts, I made as good investigation as I could, I found that Mr. Laisure had worked right along, that he could not have done so if he had been injured as he said, as he alleged."

The court sustained a motion to strike the answer.

"There was one other thing I want to suggest as a reason. I saw by the complaint, there were two dates alleged that he was injured, it says that he was injured on June 17, 1911, and on that date he was not working for the company."

Motion to strike this was sustained.

Mr. Leonard, president of the coal company, testified on cross-examination:

"Q. You assumed from the conversation that you had with Mr. Reynolds that the case would not be proceeded with further, did you not? A. Well from the conversation that we had, and from the fact that there was nothing in the case, I did not think it would go any further. Q. I presume you

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knew that if the case was dropped at that time, that it would be to the advantage of your company, the Chehalis Coal Company? A. I supposed that it had been dropped."

The court made findings too lengthy for quotation, concluded that the judgment assailed should be vacated, and entered a decree vacating that judgment and authorizing the Chehalis Coal Company, plaintiff here, to file its appearance as defendant in the original action of Laisure v. Chehalis Coal Company, and to proceed with its defense in that action. The court neither found nor did it adjudge that the plaintiff herein has or had a valid defense to the original action.

Defendant Laisure appeals, assigning as error, (1) that the findings do not support the decree, and (2) that the proofs were insufficient to sustain the decree.

This is a suit in equity. The making of findings of fact and conclusions of law, though entirely proper, was unnecessary. *Cook v. Washington-Oregon Corporation*, 84 Wash. 68, 146 Pac. 156, 149 Pac. 325; *Wintermute v. Carner*, 8 Wash. 585, 36 Pac. 490; *Knowles v. Rodgers*, 27 Wash. 211, 67 Pac. 572; *White Crest Canning Co. v. Sims*, 30 Wash. 374, 70 Pac. 1003. The case being here for a trial *de novo*, we must look to the evidence in any event. Rem. Code, § 1736.

The real question in this case arises under the second assignment. Will equity relieve against a judgment rendered in an action at law without an adjudication that there is a defense on the merits? Appellant assumes the negative, relying mainly upon the decisions of this court in *Brandt v. Little*, 47 Wash. 194, 91 Pac. 765, 14 L. R. A. (N. S.) 213; *Hoefer v. Sawtelle*, 43 Wash. 23, 85 Pac. 853, and *Williams v. Breen*, 25 Wash. 666, 66 Pac. 103. Respondent urges the affirmative, placing its reliance mainly upon the cases of *Hole v. Page*, 20 Wash. 208, 54 Pac. 1123; *Bennett v. Supreme Tent etc. Maccabees*, 40 Wash. 431, 82 Pac. 744, 2 L. R. A. (N. S.) 389; *Lushington v. Seattle Auto & Driving Club*, 60 Wash. 546, 111 Pac. 785, and *Sakai v. Keeley*, 66 Wash. 172, 119 Pac. 190. We think that the logical trend of our own de-

cisions makes the answer to this question depend upon whether or not the judgment sought to be vacated in any given case is void or merely voidable.

This court has held that a suit in equity to set aside a judgment is a direct, not a collateral attack, and in such a case it may be shown by evidence *de hors* the judgment roll that the judgment was void for want of service of process. *Johnson v. Gregory*, 4 Wash. 109, 29 Pac. 881, 31 Am. St. 907. The same principle is declared in at least two other decisions of this court where it is held that a cross-complaint seeking affirmative relief against a judgment is a direct, not a collateral attack, on the judgment, and that in such a case evidence *aliunde* the judgment roll is admissible to show the judgment void for lack of valid service. *Waterman v. Bash*, 46 Wash. 212, 89 Pac. 556; *Northwestern & Pacific Hypotheek Bank v. Ridpath*, 29 Wash. 687, 70 Pac. 139.

It must, of course, be conceded that a proceeding by motion or petition under the statute (Rem. Code, §§ 303, 464) to set aside a judgment is a direct and not a collateral attack on the judgment. This court is also committed to the doctrine that, in *proceedings under the statute* by petition or motion to set aside a judgment obtained without jurisdiction, i. e., without legal service of process, the lack of such service may be shown by evidence *de hors* the judgment roll, and in such a case no other showing is required; that, this being shown, the judgment is void and the court has the inherent power to clear its record of the void judgment, and that no affidavit or showing of merits in such a case is necessary. *Lushington v. Seattle Auto & Driving Club*, and *Sakai v. Keeley*, *supra*; *Wheeler v. Moore*, 10 Wash. 309, 38 Pac. 1053; *Bennett v. Supreme Tent etc. Maccabees*, *supra*; *Dane v. Daniels*, 28 Wash. 155, 68 Pac. 446.

But the statutory proceeding to vacate a judgment is but a statutory substitute for the bill in equity for the same purpose. *Denny-Renton Clay & Coal Co. v. Sartori*, 87 Wash. 545, 151 Pac. 1088; *Williams v. Stackweather*, 24 R. I. 512,

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53 Atl. 870. Since both are direct attacks, and since the lack of jurisdiction by valid service may be shown in both cases by evidence *aliunde* the judgment roll, and since one is but a statutory substitute for the other, it would seem to follow as of course that the inherent power of the court to clear its records of a void judgment in a suit in equity brought for the purpose should be no more circumscribed than in a proceeding under the statute for the same purpose. In neither case should this inherent power be held to be dependent upon an affidavit or showing of merits. Such a showing is logically no more necessary in the one case than in the other. It is the *fact* of lack of service and the *fact* that the judgment is void, not merely irregular or voidable, which invokes this inherent power of the court in any case.

It would seem, therefore, that the decision in the case of *Brandt v. Little*, *supra*, relied upon by appellant, though probably in harmony with the preponderance of authority in other jurisdictions, is, as intimated in *Lushington v. Seattle Auto & Driving Club*, *supra*, out of logical harmony with our own decisions. Certainly if, as held in *Johnson v. Gregory*, *Waterman v. Bash*, and *Northwestern & Pacific Hypotheek Bank v. Ridpath*, *supra*, the lack of jurisdiction because of lack of service may be shown by evidence outside of the judgment roll in a suit in equity, there is no good reason why the inherent power of the court to vacate the void judgment without a further showing of merits should depend on whether the fact of lack of jurisdiction appears on the face of the record or not. The judgment is simply void, and when that fact is shown it is no less void in one case than in the other.

But whatever the rule may be in suits in equity to set aside judgments absolutely void for lack of service, that rule is not essentially controlling here, since the judgment here involved was not a void judgment. Though the copy of the summons which was served upon respondent as defendant in the original action was not signed, the complaint in this action does not attempt to assert that fact as a ground for vacating the

judgment. Moreover, respondent actually appeared in response to that service by serving upon appellant's then attorneys in that action a motion to require the complaint to be made more definite and certain and a demand for a bill of particulars, thus effectually waiving any defect in the service and submitting to the jurisdiction of the court. The court thereafter had jurisdiction. If through fraud or concealment practiced upon it, or through inadvertence or mistake, it thereafter entered a judgment prematurely or while a motion was pending undisposed of and without notice, the judgment was irregularly entered. It was voidable, not void. 1 Freeman, Judgments (4th ed.), § 126; *Marshall & Ilsley Bank v. Milwaukee Worsted Mills*, 84 Wis. 23, 53 N. W. 1126; *Salter v. Hilgen*, 40 Wis. 363; *Davison v. Brown*, 93 Wis. 85, 67 N. W. 42; *In re Estate of Newman*, 75 Cal. 213, 16 Pac. 887, 7 Am. St. 146; *Ballinger v. Tarbell*, 16 Iowa 491, 85 Am. Dec. 527; *McAlpine v. Sweetser*, 76 Ind. 78. It is the rule in such a case with which we are here concerned.

In reviewing proceedings under the statutes to vacate judgments not void for lack of service, but voidable because suffered through excusable neglect, mistake, surprise or inadvertence of a party (§ 303), or for mistake, neglect or omission of the clerk, or irregularity in obtaining the judgment, or fraud of the successful party, or unavoidable casualty or misfortune (§ 464), this court has repeatedly held that it is not enough merely to show the existence of the statutory grounds for vacation, but that there must also be shown the existence of a valid defense on the merits to the action in which the judgment was rendered.

In *Northern Pac. & P. S. S. R. Co. v. Black*, 3 Wash. 327, 28 Pac. 538, in review of a proceeding instituted by motion under § 303, this court said:

"Two things at least must concur—an excusable mistake, followed by a judgment which is wrongful or oppressive; and however clearly the first may be made to appear, no court will relieve against a judgment regularly entered unless it

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*prima facie* appears from the showing that said judgment is wrongful or oppressive as against the party moving."

In *Tacoma Lumber & Mfg. Co. v. Wolff*, 7 Wash. 478, 35 Pac. 115, 755, in reviewing a proceeding instituted by petition under § 464, the court said:

"All courts hold, and we have frequently done so, that it is not enough to entitle a party to have a judgment against him vacated that he should show that it had been irregularly entered; he must, in addition thereto, establish to the satisfaction of the court the fact that such judgment is unjust and inequitable as against him. Proceedings of this kind are of an equitable nature, and courts will not interfere with the judgment simply because it may have been erroneously entered, unless, in addition thereto, it is made to appear that it is unjustly burdensome to the moving party. In such a proceeding pure technicalities can have little influence upon the decision of the court, if the judgment sought to be vacated is not of such a nature that, if it were set aside, the moving party would be able to interpose a substantial defense upon a new trial, or in another proceeding involving the same cause of action."

In *Williams v. Breen*, 25 Wash. 666, 66 Pac. 103, in reviewing a proceeding instituted under both of the above mentioned sections of the statute, this court again held that in addition to a showing of the statutory grounds for vacation, the provisions of Rem. Code, § 469, requiring an adjudication that there is a valid defense must also be met, and are sufficiently met when "the court finds that the facts alleged constitute a defense to the cause of action stated in the complaint, and that there is substantial evidence to support the allegations."

In *Hoefer v. Sawtelle*, 43 Wash. 23, 85 Pac. 853, was involved a proceeding under the statute to vacate a judgment for fraud on the part of defendant's attorneys in stipulating for the entry of the judgment. The petitioners set up the facts showing the fraud and alleged that they had a meritorious defense to the action. The trial court sustained a

demurrer to the petition. This court affirmed that ruling on the ground that § 469 required an adjudication of a valid defense as a prerequisite to a vacation of the judgment, and added:

“It would be impossible for the court to have adjudged that there was a valid defense to the action under the averments of the petition which, in this respect, is simply a bare conclusion that appellants have a meritorious defense to the action brought against them.”

The sum of the holdings in these cases is that, where the judgment sought to be vacated is not void for lack of jurisdiction obtained by service, but is voidable because irregularly or fraudulently procured, it will not be vacated until the court finds, not only that the facts alleged in the petition to vacate constitute a defense to the cause of action stated in the complaint in the original action, but also that there is substantial evidence to support, at least *prima facie*, the matter of defense so alleged. As pointed out in *Williams v. Breen, supra*, this does not mean that the court on such a petition must try the entire cause, but only that it must find that the evidence adduced is *prima facie* sufficient to take the case to a jury. See, also, *Paltro v. Gavenas, ante* p. 327, 166 Pac. 1156. This is not only the rule in this state, as amply sustained by the above decisions, but it is the general rule under statutes such as ours. Rem. Code, § 469.

“The applicant must show that he has a valid and meritorious defense to the action; and this must be made to appear, not by a mere averment that he has such a defense, but by setting forth fully the facts which constitute the proposed defense. And in some of the states, it is provided by statute that a judgment shall not be vacated until it is adjudged that there is a valid defense to the action, or, if the plaintiff seeks its vacation, that there is a valid cause of action. Where this provision is in force, it is error for the court to render a judgment of vacation before it has adjudged that there is a valid defense.” 1 Black, Judgments (2d ed.), pp. 535, 536, § 346a.



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The same rule prevails almost universally where relief against a judgment not void but voidable is sought by action in equity on the ground of irregularity or fraud in its procurement. *Bankers' Union of the World v. Landis*, 75 Neb. 625, 106 N. W. 973; *Massachusetts Benefit Life Ass'n v. Lohmiller*, 74 Fed. 23; *Reed v. Bank of Ukiah*, 148 Cal. 96, 82 Pac. 845.

Again it would seem, therefore, that the decision of this court in *Hole v. Page*, 20 Wash. 208, 54 Pac. 1123, in which it was held that the defendant was entitled, as a matter of right, to have a premature default judgment set aside without any affidavit or showing of a meritorious defense, is also out of harmony, not only with our own decisions, but with the great weight of authority everywhere, whether the proceeding be under the statute by motion or petition or by an independent action in equity. That decision would be sound enough in its reasoning had its premises been sound. The premises, however, were faulty in that it seems to have been assumed that the judgment, because prematurely entered, was absolutely void, whereas, the court having acquired jurisdiction by service of summons, the premature default rendered the judgment voidable merely, not void. That case has been cited by this court as authority in cases of judgments void for want of any service, but has not been followed in any case where the judgment involved was merely voidable. We think the rule there announced should be limited to cases involving void judgments, as distinguished from those voidable merely from whatever cause.

The grounds alleged for setting aside the judgment in this case are clearly irregularity in obtaining the judgment and fraud practiced by the prevailing party. These are statutory grounds. Rem. Code, § 464. It is a general rule that, if a party seeks relief from a judgment on any of the grounds specified in the statute, he must bring himself within its terms and his application must be made within the time limited. 1 Black, Judgments (2d ed.), p. 512, § 334. The ap-

plication may be made by an independent suit in equity where the failure to discover the ground within the time limited by the statute is traceable to fraud or concealment of the adverse party. Equity will always relieve against the consequences of concealed fraud or fraud by concealment if invoked promptly on discovery. *Denny-Renton Clay & Coal Co. v. Sartori*, 87 Wash. 545, 151 Pac. 1088; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757.

We think the respondent in the case before us has brought itself within this rule. While appellant probably was not guilty of any conscious fraud, and his present attorneys certainly were not, his former attorneys just as certainly were. They knew that respondent had appeared in the original action but did not divulge the fact to their client. As between him and respondent, he was nevertheless chargeable with their knowledge. The appellant and his present attorneys were thus led to apply for and secure a default judgment without notice to respondent, and in fraud of respondent's rights. The true facts were not discovered until a short time before the commencement of this action. We are convinced that respondent in its complaint stated a cause of action for vacation of the judgment and also stated facts which would constitute a meritorious defense. It failed, however, to introduce any substantial evidence *prima facie* calculated to sustain these matters of defense. The evidence offered was purely hearsay and conclusions. Owing to the apparent logical incoherence of our own decisions, however, simple justice demands that the cause be remanded with leave to respondent to present such evidence if it can.

A question going to our jurisdiction to hear this appeal, though not raised in the briefs nor in argument, met us at the threshold of our investigation and should be noticed.

This court has repeatedly held that an order, entered on motion or petition in the original action, setting aside a default judgment and giving a defendant leave to appear and defend is not appealable. *Freeman v. Ambrose*, 12 Wash.

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1, 40 Pac. 381; *Hart Lumber Co. v. Rucker*, 17 Wash. 600, 50 Pac. 484; *Nelson v. Denny*, 26 Wash. 327, 67 Pac. 78; *Metler v. Metler*, 28 Wash. 734, 69 Pac. 9. See, also, *Tatum v. Geist*, 40 Wash. 575, 82 Pac. 902. This, on the ground that the order can be reviewed after a final judgment shall have been entered in the cause by an appeal from such final judgment. This court has also held that, though the proceeding be by separate action to set aside the judgment, it must be treated as a proceeding within the original cause and not as an independent action, when filed within one year from the date of entry of the judgment, because the statutory method is exclusive during that year, and in such a case no appeal will lie from the order since it may be reviewed on appeal from any final judgment thereafter entered in the original cause. *State ex rel. Post v. Superior Court*, 31 Wash. 53, 71 Pac. 740; *Post v. Spokane*, 35 Wash. 114, 76 Pac. 510; *Sengfelder v. Powell-Sanders Co.*, 40 Wash. 686, 82 Pac. 931; *Reitmeir v. Siegmund*, 13 Wash. 624, 43 Pac. 878. While it does not appear in the opinions in the *Sengfelder* and *Reitmeir* cases that the proceedings to vacate were commenced in either of those cases within the year from the entry of the judgment, we have examined the record in each case and find that, as a matter of fact, the judgment in each case was actually entered less than a year before the commencement of the proceeding to vacate. In the *Sengfelder* case, the judgment was entered *nunc pro tunc* as of a date more than a year prior to the commencement of the proceeding to vacate, but this court on appeal treated the date of the judgment as of the actual date of entry as is shown by the citation of the *Post* cases. But in no case has this court held, where a judgment is vacated through an independent action in equity for fraud in its procurement which was not discovered till after the expiration of the statutory period from the actual entry of the judgment, that such action in equity should be or can be treated as a proceeding in the original cause so as to render the decree in the equity suit reviewable

on an appeal from the judgment which may be finally rendered in the original action. The contrary view would seem inevitable, since it is only by virtue of the statute and the exclusiveness of its remedy that the proceeding to vacate a judgment, other than by the ordinary motion for a new trial, can be considered a proceeding in the original action in any case. As we attempted to point out in *Denny-Renton Clay & Coal Co. v. Sartori*, *supra*, except in cases of judgments void for lack of jurisdiction, it is only in cases where the judgment is assailed on the ground of concealed fraud or fraud by concealment in its procurement that resort may be had to a suit in equity to vacate it after the expiration of one year. It would seem illogical and incongruous to hold that the exercise of this equity jurisdiction, which exists not because of, but in spite of, the statute governing the procedure in the original action, is nevertheless a proceeding in that action. These considerations have moved us to entertain this appeal.

The judgment is reversed, and the cause is remanded with direction to the trial court to take such competent proof as may be offered in support of the matters of defense set forth in the complaint, and thereon determine whether respondent has substantial evidence to sustain the matters alleged in defense to the original action. If that question be determined in the affirmative, the judgment should be vacated, with leave to both parties to make up the issues for trial; but if determined in the negative, the original judgment should stand.

MORRIS, MAIN, and PARKER, JJ., concur.

CHADWICK, J. (dissenting).—I think the complaint is sufficient and the judgment should be affirmed.

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Opinion Per PARKER, J.

[No. 13665. *En Banc*. July 25, 1917.]

OMA RHINES, *Appellant*, v. WILLIAM B. YOUNG, *as*  
*Administrator, et al., Respondents*.<sup>1</sup>

**DEEDS—DELIVERY TO AGENT—INTENT—EFFECT.** The execution of a deed intended as a testamentary disposition, and delivery to an agent to be delivered to the grantee after the grantor's death, is not effectual as a conveyance, where the grantor understood that she retained control, and retook possession of the deed, since the delivery must be absolute and beyond recall.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered December 15, 1915, upon findings in favor of the defendants, in an action to quiet title, tried to the court. Affirmed.

*B. W. Coiner*, for appellant.

*Herbert S. Griggs, Williamson, Williamson & Freeman,*  
and *Kelly & McMahon*, for respondents.

PARKER, J.—The plaintiff, Oma Rhines, seeks recovery of possession of certain real property in the city of Tacoma from the defendants William B. Young and others and also to be adjudged the owner thereof as against the claims of the defendants. Trial in the superior court for Pierce county resulted in findings and judgment in favor of the defendants, from which the plaintiff has appealed to this court.

On November 19, 1909, Mrs. Anna Farrell, the grandmother of appellant, was the owner, in her own right as her separate property, of the real property here in question. On that day she caused to be prepared by her attorney, Mr. C. M. Riddell, a deed absolute in form purporting to convey the property to appellant. This deed was then signed and acknowledged by her and left with Mr. Riddell with instructions, as he claims to have understood her, to deliver it to appellant upon the death of Anna Farrell and when satisfac-

<sup>1</sup>Reported in 166 Pac. 642.

tory proof should be furnished him of her death. In November, 1912, Mrs. Farrell went to Mr. Riddell and procured the deed from him. He then voluntarily gave it to her. This was done under such circumstances as to strongly indicate that both of them regarded the deed as being at all times in his possession merely as her agent and at all times under her dominion and control without any right or duty on his part to hold the same for the exclusive benefit of appellant. Mr. Riddell thereafter became of the opinion that he had mistaken his duty in surrendering the deed to Mrs. Farrell. Reflecting upon the circumstances under which the deed was signed, acknowledged, and left with him as he remembered them, he became of the opinion that the deed had been delivered to him by Mrs. Farrell with intent on her part to surrender all dominion and control over it and with the view of then vesting title to the property in appellant, though it was not to be delivered by him to appellant until after the death of Mrs. Farrell. Neither the deed nor the property has ever been in the actual or constructive possession of appellant, Mrs. Farrell remaining in possession of both the deed and the property until the time of her death. Mr. Riddell has never been in any sense the agent or attorney for appellant unless he was irrevocably made such by receiving the deed from Mrs. Farrell under such circumstances that it can be held she then surrendered all dominion and control over it. Mrs. Farrell died intestate at Tacoma in March, 1913. Thereafter William B. Young, her son and heir, became the duly appointed and qualified administrator of her estate. Respondent Martha Young is the daughter and the only other heir of Mrs. Farrell, and the other respondents have acquired an interest in the property as grantees of William B. Young. The property has been, since the death of Mrs. Farrell, in the possession of William B. Young, subject to the interests of the other respondents. This action was commenced in May, 1914, resulting in denial of the relief prayed for by appellant as above noticed.

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Mr. Riddell is the only witness who testified as to what was said and done by Mrs. Farrell at the time the deed was signed, acknowledged, and left with him by her. Indeed, he appears to be the only living witness of what then occurred, he being the notary before whom Mrs. Farrell acknowledged the deed and also the only witness to the deed signing as such. While the evidence seems to justify the belief that Mr. Riddell honestly believed that he had mistaken his duty in surrendering the deed to Mrs. Farrell during her lifetime and honestly became of the opinion that it was left with him by Mrs. Farrell with a view of then surrendering all dominion and control over it and having it delivered after her death to appellant, we feel constrained to conclude, as the trial judge did, that Mrs. Farrell did not intend to surrender dominion and control over the deed by leaving it with Mr. Riddell, but left it with him, as she believed, solely as her agent and with the right on her part of at all times exercising dominion and control over it. The testimony given upon the trial touching the question of Mrs. Farrell's intention at the time of leaving the deed with Mr. Riddell is quite voluminous and much of it in important particulars in serious conflict. A careful reading of the evidence, however, convinces us, as it did the trial judge, that Mrs. Farrell, at the time of signing and acknowledging the deed, and leaving it with Mr. Riddell and at all times thereafter, labored under the belief that she had, by its signing and acknowledgment, in effect made a testamentary disposition of her property and not an absolute conveyance thereof. We deem it unnecessary to review the evidence in detail here.

In view of our conclusion touching the question of fact as to the intent of Mrs. Farrell in leaving the deed with Mr. Riddell, the law of the case seems plain. No claim is here made that the signing and acknowledging of the deed and the leaving of it with Mr. Riddell by Mrs. Farrell constituted a valid testamentary disposition of the property therein described. Indeed, no such claim could be successfully made,

in view of the provisions of § 1320, Rem. Code, prescribing the manner of making wills in this state. It seems equally plain that the signing, acknowledging, and leaving with Mr. Riddell of the deed by Mrs. Farrell was not an effectual conveyance of the property, because of the fact that it was not delivered in the sense that Mrs. Farrell surrendered dominion and control over it. It seems to be well settled law that, while a deed may become effectual to divest an owner executing it of title to the property described therein, by delivering it to a third person to be delivered to the grantee after the death of the owner, such delivery by the owner to a third person must be such that it becomes absolute and beyond recall by the owner. Otherwise there is in law no delivery of the deed to render it effectual as such. The rule is stated in 8 R. C. L. 996, as follows:

“The rule sustained by the great weight of authority is that the grantor must not only deliver the deed to a third person for the benefit of the grantee ultimately, and in some way express his intention to that effect, but must also part both with the possession of the deed and with all dominion and control over it.”

Our own decisions are in harmony with this rule. *Meikle v. Cloquet*, 44 Wash. 513, 87 Pac. 841; *Maxwell v. Harper*, 51 Wash. 351, 98 Pac. 756. See note to *Munro v. Bowles*, 54 L. R. A. 872. We deem it unnecessary to further discuss the law of the case. The real question here involved is, in its last analysis, one of fact, to wit, What was the intention of Mrs. Farrell in signing, acknowledging, and leaving the deed with Mr. Riddell?

The judgment is affirmed.

MOUNT, MAIN, HOLCOMB, FULLERTON, MORRIS, and CHADWICK, JJ., concur.

ELLIS, C. J., took no part.



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[No. 13915. Department One. July 25, 1917.]

C. J. SLATON *et al.*, *Respondents*, v. CHICAGO, MILWAUKEE &  
ST. PAUL RAILWAY COMPANY, *Appellant*.<sup>1</sup>

RAILROADS—FIRES—NEGLIGENCE—QUESTION FOR JURY. It cannot be held as a matter of law that oil burning locomotives cannot cause fires upon the right of way, and the question is for the jury, where two witnesses testified to fires escaping from oil burners.

SAME—FIRES—NEGLIGENCE—EVIDENCE—ADMISSIBILITY. In an action for a railroad fire, based upon the negligent keeping of the right of way, evidence of other fires along the right of way at other times is admissible as tending to show a knowledge of the condition and negligence.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered November 3, 1916, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages from fire. Affirmed.

*Geo. W. Korte* and *E. E. Wager*, for appellant.

*Hovey & Hale*, for respondents.

CHADWICK, J.—This action was brought to recover for the burning of a barn and its contents. The barn was situate adjacent to the right of way of the appellant company. It is alleged that the fire started in dried grass and weeds upon the right of way, and that the appellant carelessly and negligently permitted fire to escape from a locomotive which passed a short time before the fire was discovered.

The latter ground was abandoned at the time of trial and is not urged here. The case rests upon the first ground, that is, that the company had carelessly and negligently permitted its right of way to become covered with combustible material.

The engine from which the fire must have come, and the jury have so found, was an oil burner. From the beginning of the action, appellant has consistently maintained that it

<sup>1</sup>Reported in 166 Pac. 644.

is impossible for an oil burner to throw sparks or other heat carrying particles; and that, for this reason, the case is to be distinguished from *Abrams v. Seattle & M. R. Co.*, 27 Wash. 507, 68 Pac. 78; *Asplund v. Great Northern R. Co.*, 63 Wash. 164, 114 Pac. 1043; *Overacker v. Northern Pac. R. Co.*, 64 Wash. 491, 117 Pac. 403; *Thorgrimson v. Northern Pac. R. Co.*, 64 Wash. 500, 117 Pac. 506. In each of the cases cited, the suspected engines were coal burners, of which this court and all others have said they cannot be operated without throwing sparks in greater or less degree, and for that reason a duty is put upon railroads of keeping their right of way clear of combustible material.

We cannot hold, as a matter of law, as we are invited to do by appellant, that an oil burning engine cannot cause a fire upon a right of way. We may admit that it is most improbable, and that upon the whole record the testimony of the appellant seems to preponderate in its favor, but it was for the jury to find a preponderance. There is evidence to sustain its verdict.

It seems that it is customary, in fact necessary, to the economical operation of an oil burning locomotive, that it be "sanded" from time to time. A box of sand is carried on each engine, and as required the fireman throws a shovelful into the firebox. This is taken up by the blast and forced through the boiler tubes, clearing them of all soot and hardened particles. One witness called such particles carbon. The possibility of throwing such particles, if not coarse grains of sand or small gravel—which would of course blow out of the stack heated to an intense heat—was shown.

One witness said that he had observed sparks escaping from an oil burner (Abstract, page 28), and an engineer in the employ of the company admitted that a fire had started from his engine on another occasion, attributing it to the fact, as was afterwards ascertained, that a brick had become loosened in the firebox. Upon this state of facts, the language

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of the court in *Viera v. Atchison, T. & S. F. R. Co.*, 10 Cal. App. 267, 101 Pac. 690, on page 269, is apt.

“The law does not require demonstration, or absolute certainty, because such proof is rarely possible. Moral certainty only is required. We must call in aid of the verdict all deductions which the jury could make from the facts proved. Nearly all cases are determined on the reasonable probability of the fact being as found. Human laws and institutions are not perfect, and with the most careful vigilance of the judge, and the most conscientious discharge of their duty by twelve men duly sworn, the final result in most cases is but an approximation. In the present case it has not been demonstrated beyond doubt that the fire was caused by sparks escaping from defendant’s engine, but a fire did occur, and originated on or near defendant’s right of way, on which was a large quantity of dry grass; it was seen almost immediately after defendant’s engine passed. Plaintiff’s property was destroyed. The reasonable probability that the fire was caused by sparks from defendant’s engine has been determined by the agreement of twelve men. This is one of the methods the law has provided for the settlement of questions of fact, and we cannot set aside the verdict of the jury when supported by such evidence as herein indicated. It is true that the evidence of the defendant showed that the engine was an oil burner in first-class condition. Two engineers of defendant testified that they had never known of sparks escaping from an oil-burning engine and setting fire to grass on the road. But, as we have said, the evidence is sufficient to justify the jury in finding that the fire was caused by defendant’s passing engine.”

Evidence of other fires along the right of way at other times, and as it is alleged under other conditions, was admitted. This is complained of as too remote. Whether testimony tending to show reasonable probability is remote or direct is a question resting in the sound discretion of the court. If the case were predicated upon the negligent operation of the engine, we would be inclined to hold that the testimony was too remote, there being no showing that the former fires started from oil burning engines. But where the action is based upon the negligent keeping of the right of way, we

think it was proper to admit the testimony as tending to show knowledge of a condition and a negligent toleration of it. We find no error.

Affirmed.

ELLIS, C. J., MORRIS, and MAIN, JJ., concur.

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[No. 14043. Department One. July 25, 1917.]

JAMES BOE, *Appellant*, v. HODGSON GRAHAM COMPANY,  
*Respondent*.<sup>1</sup>

TRIAL—FINDINGS OF FACT—NECESSITY. In an action at law in which issues of fact are tried out on the merits before the court without a jury, findings of fact are necessary to support the judgment; under Rem. Code, § 367, providing that, upon the trial of an issue of fact by the court, its decision shall be given in writing, with the facts found and the conclusions of law separately stated.

Appeal from a judgment of the superior court for San Juan county, Brawley, J., entered October 4, 1916, dismissing on the merits an action at law, after a trial to the court. Reversed.

*J. W. Bryan*, for appellant.

*Frank P. Christensen*, for respondent.

CHADWICK, J.—After a full hearing on the merits, the court entered a judgment in favor of the defendant, the material parts of which follow:

“ . . . witnesses for plaintiff and defendant having been duly sworn and examined; and the court having heard all of the evidence of plaintiff and defendant, and being fully advised in the premises;

“It is hereby ordered, adjudged and decreed, That plaintiff has wholly failed to make out a cause of action against defendant, and has failed to prove the allegations set forth

<sup>1</sup>Reported in 166 Pac. 779.

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in his complaint, and judgment is hereby entered in favor of defendant and against plaintiff, and that the defendant recover its costs and disbursements herein incurred.

"To which judgment entry the plaintiff excepts and his exceptions allowed.

"Done in open court this 30th day of August, 1916."

No findings of fact or conclusions of law were made by the court.

The first error assigned is that the court failed to make findings of fact and conclusions of law. The case falls squarely within the rule announced in *Western Dry Goods Company v. Hamilton*, 86 Wash. 478, 150 Pac. 1171, and will be sent back for findings unless the judgment is to be held one of dismissal, or as one in which no affirmative relief is granted. The rule announced in the case just cited is well grounded in reasons to which this court has adverted in *Bard v. Kleebe*, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273, in *Western Dry Goods Co. v. Hamilton*, *supra*, and in *Colvin v. Clark*, 83 Wash. 376, 145 Pac. 419. The statute is plain.

"Upon the trial of an issue of fact by the court, its decisions shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon its decision shall be entered accordingly." Rem. Code, § 367.

It makes no exception where the judgment is entered after trial upon conflicting evidence in favor of the defendant. It is not equivalent to a judgment of dismissal, or a judgment of nonsuit. *Broderius v. Anderson*, 54 Wash. 591, 103 Pac. 837.

A fair test of the operation of the statute is to be found in the issues presented to this court. If it be a question of law only, the facts are of no consequence. The findings by the trial judge would be of no assistance. But where we are called upon to determine the weight of the testimony as between the parties, findings and conclusions are essential, and,

as we have held in the cases cited, made mandatory by the statute. Having disposed of the case of *Slayton v. Felt*, 40 Wash. 1, 82 Pac. 173, in the *Western Dry Goods* case, the only other case to which our attention has been called that might seem to be contrary is that of *Lamar v. Anderson*, 71 Wash. 314, 128 Pac. 672. But in that case the court qualified its apparent holding, saying: "We do not know what finding of fact the court could have made upon which to base its judgment, since it would appear that the ruling was upon a point of law rather than a decision of facts."

We adhere to the rule of the statute—the statute as it reads—and our former decisions, that a judgment upon disputed facts will not be reviewed where there are no findings of fact or conclusions of law to sustain it. The case will be remanded for findings under the authority of *Colvin v. Clark*, *supra*. Appellant will recover his costs in this court. The costs in the court below will abide final judgment.

Remanded with instructions.

ELLIS, C. J., MORRIS, and MAIN, JJ., concur.

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Opinion Per MORRIS, J.

[No. 14073. Department One. July 25, 1917.]

**NED BISBEE, *Appellant*, v. C. L. LACKY *et al.*, *Respondents*.**<sup>1</sup>

**APPEAL—STATEMENT OF FACTS—TIME FOR FILING—STATUTES.** A statement of facts proposed and served prior to the final judgment appealed from and certified as a conceded statement of facts without amendment within thirty days after the judgment, is in time; since, under Rem. Code, §§ 388 and 389, the statement of facts may be filed and served at any time, the only limitation being § 393, providing that it must be filed before or within 30 days after the time begins to run within which an appeal may be taken.

**ADVERSE POSSESSION—CLAIM OF RIGHT—EASEMENTS—EVIDENCE—SUFFICIENCY.** The open, notorious and continuous use by the public for 25 years of a landing place for small boats and the adjacent land leading to the county road, is insufficient to establish an easement by prescription, where there was no color of title or claim of right; and the presumption that such use was adverse is overcome, where the witnesses testified that they did not use the land under a claim of right and never heard of any one who did.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered November 18, 1916, upon findings in favor of the defendants, in an action to quiet title, tried to the court. Reversed.

*Jesse Thomas*, for appellant.

*Frank A. McGill* and *W. McB. Perrin*, for respondents.

**MORRIS, J.**—Appellant is the record owner of part of lot 8, section 6, township 21 north, range 1 east, in Pierce county, extending from the government harbor area in Balch's Cove, a small arm of Puget Sound, to the shore near the northwest corner of the tract. The land in controversy is covered by the tides, but is held under government patent. In June, 1910, respondents purchased from the appellant twenty acres in the southwest corner of section 31, township 22, lying to the north of lot 8. The south line of this twenty acres is the Glen Cove road which crosses Balch's Cove on a bridge a short distance north of the township line. A short

<sup>1</sup>Reported in 166 Pac. 638.

time prior to the commencement of this action, respondents asserted a claim to a right of way, beginning at the west end of the bridge, thence in a southeasterly direction across lot 3 to the waterway, thence down the cove to the Sound. Appellant sought in this action to quiet his title against the claim of respondents. Respondents set up that, as an inducement to the purchase of the twenty acres, appellant held out the value of the tract by reason of its easy access to the water along the claimed right of way; and as a separate defense alleged the open, notorious, continuous and adverse use of the landing and the right of way by the public for a period of twenty years. The lower court sustained this last defense and entered a decree adjudging and establishing an easement in the public thirty-six feet wide from the west end of the bridge, across lot 3, to the waters of the cove, thence down the cove to the Sound, from which decree this appeal is taken.

Respondents move to strike the statement of facts upon the ground that it was not filed nor served within thirty days after the time began to run within which an appeal might be taken. Judgment was first entered September 1, 1916. On September 5, appellant filed his exceptions and immediately prepared his proposed statement of facts preparatory to an appeal, and filed and served the same on September 27. On October 9, an order was entered vacating the first judgment, and on November 18 the judgment appealed from was entered. Appellant perfected his appeal from this last judgment, and on November 27, no amendments having been proposed, the statement of facts was certified. The statement of facts was filed within the time provided by law. Section 393, Rem. Code, provides that the statement of facts must be filed and served either before or within thirty days after the time begins to run within which an appeal may be taken. The only time limitation upon the filing and serving of the statement of facts is thirty days after the judgment becomes final, unless, as provided by statute, the time be enlarged. There is no limitation as to the time preceding final judgment within



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which the statement may be filed and served, the only limitation is as to the last day. Under §§ 888 and 389, a statement of facts may be filed and served at any time, save for the limitation provided for in § 393. The law never requires the doing of a useless thing. Having filed and served his proposed statement of facts prior to the entry of final judgment, no requirement rested upon appellant to withdraw the same from the files in order to refile and reserve the same within thirty days after the entry of final judgment. The statement was certified on November 27, without amendment or exception, thus coming to us as a conceded statement of facts containing all the matters material to a review of the judgment not otherwise a part of the record. The motion to strike is denied.

Coming now to the merits, the lower court refused to find that, at the time of the purchase of the twenty acres by respondents and as an inducement to the purchase thereof, appellant represented that the land was valuable because of its access to the water, or that respondents would have the use or enjoyment of any part of lot 3. In so refusing to find, we believe the lower court was correct and that part of respondents' contention may be dismissed with the sole comment that the record is insufficient to so find.

Respondents' case must rest or fall upon his plea of an easement in the public. The evidence is sufficient to find that, for more than twenty-five years, the residents of Glen Cove and vicinity have used a small gravelly point in lot 3 as a landing place for small boats, passing thence to the county road, and that such use has been open, notorious and continuous. If these were all the elements necessary to establish adverse possession, respondents' case would be made out. One necessary element is lacking. Such use must be under color of title or claim of right to operate as a disseizin. *Bellingham Bay Land Co. v. Dibble*, 4 Wash. 764, 31 Pac. 30; *Blake v. Shriver*, 27 Wash. 593, 68 Pac. 330; *Hesser v. Siepmann*, 35

Wash. 14, 76 Pac. 295; *Wilcox v. Smith*, 38 Wash. 585, 80 Pac. 803; *Yesler Estate v. Holmes*, 39 Wash. 34, 80 Pac. 851; *Lohse v. Burch*, 42 Wash. 156, 84 Pac. 722; *Ramsey v. Wilson*, 52 Wash. 111, 100 Pac. 177; *Skansi v. Novak*, 84 Wash. 39, 146 Pac. 160; *O'Donnell v. McCool*, 89 Wash. 537, 154 Pac. 1090.

The record presents no claim of color of title. Neither is there proof of claim of right. The evidence goes no further than to show that, for many years, the public made use of this landing place and the land and water adjacent thereto as a convenience. This is insufficient, no matter how long indulged in, to deprive the record owner of his title. We may concede respondents' contention that the use of an easement continued unexplained for the prescribed period will be presumed to have been adverse unless of such a character as to show a mere privilege enjoyed by leave of the owner. It was so held in *Lechman v. Mills*, 46 Wash. 624, 91 Pac. 11, 13 L. R. A. (N. S.) 990. Such presumption is overcome in this case by the evidence of witnesses produced by respondent to show the character of use. These witnesses were asked upon cross-examination either if they used the land in controversy under any claim of right or if they knew or ever heard of any one who did. Both questions were answered in the negative, so that the only evidence in the record as to any claim of right to the use of this landing is that none was ever asserted other than by respondents made a day or two prior to the commencement of this action. As none was made, it is not necessary to determine what would be a sufficient claim of right. This case involves no right of the public to the use of the navigable waters of the cove other than as here determined, that no prescriptive rights have been established as against appellant.

The judgment is reversed, with instructions to enter a decree in favor of appellant.

ELLIS, C. J., CHADWICK, and MAIN, JJ., concur.

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Statement of Case.

[No. 13910. Department Two. July 31, 1917.]

DEPAUW UNIVERSITY, *Respondent*, v. MARY RIDPATH  
ANKENY, *Executrix etc., Appellant*.<sup>1</sup>

**SUBSCRIPTIONS—CONTRACT—CERTAINTY.** A subscription to an endowment fund is not void for uncertainty in that it is stated to be in consideration of the "attempt" of the trustees to add \$500,000 to the endowment fund, which is capable of being interpreted as referring to the attempt then and thereafter to be made.

**SAME.** Such contract is not void for indefiniteness in failing to define the nature of the attempt.

**SAME—CONSIDERATION.** Efforts expended in procuring subscriptions to an endowment fund of a university constitute a sufficient consideration to support a promise to pay a subscription, if, in reliance thereon, an act has been done or money expended.

**SAME.** Where a subscription to an endowment fund was, with others, exhibited to prospective subscribers, and subsequently \$27,000 was subscribed and paid to meet the expenses of the campaign, it sufficiently appears that the subscription was relied on and money expended after it was made.

**PLEADINGS—MOTIONS—JUDGMENT ON PLEADINGS.** Where motions for judgment on the pleadings were made by both parties, they are bound by the record as it then was when the motions were heard.

**SUBSCRIPTIONS—COMPLAINT—SUFFICIENCY.** A complaint upon a contract to subscribe an endowment fund in consideration of the attempt of the trustees of a university to add to the fund a specified sum, alleging that the trustees made the attempt and did all the things required of them by the contract, is sufficient to state a cause of action, in the absence of motion to make more definite and certain.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered April 18, 1916, upon findings in favor of the plaintiff, in an action on a subscription contract, tried to the court. Affirmed.

*Turner & Geraghty* (Edmond J. Farley, of counsel), for appellant.

*Cullen, Lee & Matthews*, for respondent.

<sup>1</sup>Reported in 166 Pac. 1148.

MAIN, J.—This action was brought by the plaintiff against the executrix of the estate of William M. Ridpath, deceased, to recover upon a subscription to the permanent endowment fund of DePauw University. The trial resulted in a judgment in favor of the plaintiff. From this judgment, the defendant appeals.

The facts, so far as material to the questions here presented, are substantially these: During the year 1910, DePauw University, acting through its board of trustees, and desiring to increase its endowment fund, made application to the board of trustees of what is known as the general education board of New York City for a contribution to its endowment fund. On May 24, 1910, the general education board offered to contribute \$100,000 on condition that the university would raise from other sources the sum of \$400,000 on or before the close of the 31st day of December, 1911. The university accepted the offer of the general education board, and appointed a committee to at once inaugurate a campaign to secure the \$400,000 required by the terms of the offer of the general education board. Thereafter the university, through its committee appointed for that purpose, proceeded to canvass the country to procure subscriptions for the \$400,000 mentioned. In this canvass, among others, the subscription in question was procured. The writing which evidenced the subscription agreement is as follows:

“DePauw University Endowment

“\$1,000

Mar. 18, 1911.

“In consideration of the attempt of the trustees of DePauw University to add five hundred thousand dollars to the permanent endowment fund of said university, I hereby subscribe and promise to pay to such fund the sum of one thousand dollars, payable to DePauw University at the banking house of The Union Trust Company, of Indianapolis, treasurer of the said university, as follows: In five equal annual installments, one-fifth on or before January 1, 1912, one-fifth on or before January 1, 1913, one-fifth on or before January 1, 1914, one-fifth on or before January 1, 1915, and one-fifth

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on or before January 1, 1916, with interest at the rate of five per cent per annum after maturity until paid.

“W. M. Ridpath.”

After this subscription was made, it, together with others in like or greater amounts, was used as an argument to induce subscriptions on the part of others, and for this purpose a list of such subscribers, including the name of Mr. Ridpath, was exhibited to persons solicited for funds, and after exhibiting such list, subscriptions were obtained. The canvass was continued until the close of the year 1911, at which time the \$400,000 had been fully subscribed. In addition to this, approximately \$27,000 was subscribed for the purpose of meeting the expenses of the campaign. The university received from the general education board the \$100,000 which had been promised it, and a large portion of the subscriptions had been paid in, the funds invested, and the income was being used for the purpose of carrying on the work of the university. No part of the subscription upon which this action is based was paid, and as already indicated, the action is for the purpose of collecting thereon.

It is first claimed that the writing is too indefinite to be made the basis of legal rights or obligations, and, in support of this contention, two points are made: (a) That it does not appear from the writing or the pleadings that the attempt referred to in the writing was one to be thereafter made; and (b) that the nature of the attempt is not defined.

Referring to the first point, we think the word “attempt,” used in the writing, does not necessarily refer to something that had gone before, but is capable of being interpreted as referring to the attempt then being and thereafter to be made to add \$500,000 to the permanent endowment fund of the university. The law does not look with favor upon the destruction of contracts because of uncertainty, and the courts will, if possible, so construe a contract as to carry into effect the reasonable intention of the parties if it can be ascertained. In 6 R. C. L., page 645, it is said:

"However, the law does not favor, but leans against the destruction of contracts because of uncertainty. Therefore the courts will, if possible, so construe the contract as to carry into effect the reasonable intention of the parties if that can be ascertained. Though there are some formal imperfections in a written contract, still it is sufficient if it contains matter which will enable the court to ascertain the terms and conditions on which the parties intended to bind themselves. The maxim *Id certum est, quod certum reddi potest*, applies."

As to the second point, that is, that the nature of the attempt is not defined, taking into consideration the purpose of the contract and the object to be accomplished, it cannot be held that the contract is unenforcible because of indefiniteness. What is necessary to be done in pursuance of an attempt to add to the endowment fund of a university has a reasonably well understood meaning. It may be said to be a matter of common knowledge that, in pursuance of such attempts, the thing to be done is the solicitation of subscriptions or donations. It would be applying too rigid a rule to hold that this contract is void for uncertainty. The case of *Barton v. Spinning*, 8 Wash. 458, 36 Pac. 439, is not controlling here. There the respondents had contracted to use the columns of the Tacoma Ledger for the purpose of advancing the price of real estate, when they had no control over the columns of such paper and the extent of the use of such columns was not certainly defined. As already stated, the word "attempt," used in this contract, when read in the light of the purpose to be accomplished, has a reasonably certain meaning.

It is next contended that efforts expended in procuring subscriptions do not constitute a consideration to support a promise to pay a subscription. Whatever may have been the holding of the earlier cases, the rule supported by modern authority is that a subscription agreement to pay money to a charitable, benevolent or educational institution is supported by a good consideration and is therefore enforcible if,

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in reliance upon such agreement, an act has been done, money expended, or obligations incurred. *Albert Lea College v. Brown*, 88 Minn. 524, 93 N. W. 672, 60 L. R. A. 870; *Brokaw v. McElroy*, 162 Iowa 288, 143 N. W. 1087, 50 L. R. A. (N. S.) 835; *Irwin v. Lombard University*, 56 Ohio St. 9, 46 N. E. 63, 60 Am. St. 727, 36 L. R. A. 239; *Barnett v. Franklin College*, 10 Ind. App. 103, 37 N. E. 427; *Keuka College v. Ray*, 167 N. Y. 96, 60 N. E. 325; *King v. Carroll*, 129 Iowa 364, 105 N. W. 705; *Philomath College v. Hartless*, 6 Ore. 158, 25 Am. Rep. 510; *Young Men's Christian Ass'n of Wenatchee v. Olds Co.*, 84 Wash. 630, 147 Pac. 406.

In the last case cited, it was said:

"It is generally held that, if work has been done or expenditure has been made upon the faith of and in reliance upon a subscription, a consideration is thus furnished to support the promise."

It is next claimed that no efforts or money were in fact expended pursuant to or in reliance upon the promise in question. The evidence shows, as above stated, that this subscription, together with others in like or greater amount, was exhibited to prospective subscribers as an argument to induce subscriptions, that the full amount was in fact subscribed, and that, in addition thereto and subsequent to the making of this subscription, approximately \$27,000 was subscribed and paid to meet the expenses of the campaign. This evidence, if true—and it is not contradicted—would show that the subscription contract in question was relied upon in fact, and that, after it was made, money was expended and obligations incurred.

One other point remains for consideration. The original complaint, aside from the formal parts, set out the note and alleged generally,

"That pursuant to the terms of said promissory note, the trustees of said DePauw University did attempt to add five hundred thousand dollars to the permanent endowment fund

of said university, and did all of the things required of them to be done by the terms of said note . . . .”

No motion was made, so far as appears from the record here, to make the complaint more definite and certain. A demurrer was presented, which was overruled. Thereafter an answer was filed and a reply thereto. With the pleadings in this shape, both parties joined in a motion for judgment on the pleadings. It may be here conceded that, if the complaint failed to state a cause of action, the judgment should have been granted upon the appellant's motion. Both motions were overruled, and subsequently an amended complaint was filed which stated in detail the facts constituting the attempt and the result thereof. So far as the motions for judgment on the pleadings are concerned, both parties are bound by the record as it was when these motions were heard. *State ex rel. Brown v. Superior Court*, 87 Wash. 524, 151 Pac. 1126.

It follows, therefore, that, if the original complaint did not state a cause of action, the appellant was entitled to a judgment on the pleadings upon her motion. From the excerpt quoted from the complaint, it appears that the allegations are general and, in part at least, conclusions. While the complaint was undoubtedly subject to a motion to make more definite and certain, had such been made, it does not necessarily follow from this that it is not sufficient to imperfectly state a cause of action. It is alleged that the trustees of the university, pursuant to the terms of the subscription agreement, did attempt to add \$500,000 to the permanent endowment fund of the university. This is what they were required to do by the terms of the note, and further, it was alleged that the trustees did all of the things required of them to be done by the terms of the note. While the pleading is by no means a model of excellence, and the motion for judgment on the pleadings with the complaint in that form, first made by the respondent, was doubtless an improvident motion, yet we think the allegations are sufficient to state a cause of action and to admit of proof of what was done by the trustees, or



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under their direction, in pursuance of the attempt, since, as above stated, the word "attempt," as used in the note and in the pleadings, has a reasonably certain meaning.

The doing of the acts, the expending of the money, and the incurring of the obligations which are involved in such attempt, according to the rule above stated, are sufficient consideration to support the promise, and in the absence of a motion to make more definite and certain, these facts could have been shown under the original pleading.

The judgment will be affirmed.

ELLIS, C. J., CHADWICK, MORRIS, and MOUNT, JJ., concur.

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[No. 13928. Department One. July 31, 1917.]

MORRIS & COMPANY, *Appellant*, v. HARRY W. BELKEN *et al.*,  
*Respondents*.<sup>1</sup>

PROCESS—NONRESIDENTS—SUBSTITUTED SERVICE. Where, upon dismissal of garnishment proceedings, there was no property within this state of nonresidents at the time of personal service on them outside of the state, such service was ineffectual for any purpose.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 26, 1916, dismissing garnishment proceedings, after a trial before the court. Affirmed.

*Fred W. Catlett and Emmons & Emmons*, for appellant.

*Bronson, Robinson & Jones*, for respondents.

PER CURIAM.—This appeal arises out of the same controversy referred to in *Morris & Co. v. Canadian Bank of Commerce*, 95 Wash. 418, 163 Pac. 1139. The first case involved appellant's right to a fund in the bank which was sought to be appropriated under proceedings in garnishment. This appeal involves the sufficiency of personal service upon

<sup>1</sup>Reported in 166 Pac. 1142.

respondents in Canada, which, under our statute, is the equivalent of service by publication. The final disposition of the garnishment proceedings, a rehearing having been denied, disposes of the only question involved in this appeal. The garnishment proceedings having been dismissed, it follows that, at the time of the service upon respondents, there was no property within this state that could be seized under attachment, and personal service upon respondents without this state would be ineffectual for any purpose. *Dittenhoefer v. Coeur d'Alene Clothing Co.*, 4 Wash. 519, 30 Pac. 660; *Cosh-Murray Co. v. Tutlich*, 10 Wash. 449, 38 Pac. 1134.

Judgment affirmed.

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[No. 14057. Department One. July 31, 1917.]

A. M. LUNN, *Respondent*, v. O. W. HELLGREN *et al.*,  
*Appellants*.<sup>1</sup>

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence, and in accord therewith, will not be disturbed on appeal.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered November 13, 1916, upon findings in favor of the plaintiff, in an action on promissory notes, tried to the court. Affirmed.

*Roberts, Wilson & Skeel*, for appellant Peterson.

*Saunders & Nelson*, for respondent.

MAIN, J.—The purpose of this action was to recover upon two promissory notes, one for \$750, and the other for \$1,000. Each of the notes was signed by O. W. Hellgren and indorsed on the back by Andrew Peterson, the latter only being served with process. Peterson, in his answer, admitted the execution of the notes, and alleged affirmatively that the partnership which previously existed between himself and the

<sup>1</sup>Reported in 166 Pac. 1147.

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plaintiff, Lunn, had at no time been settled and adjusted. A counterclaim was pleaded and a demand for an accounting. The trial resulted in a judgment upon the notes and a denial of any recovery upon the answer. From this judgment, Peterson appeals.

The facts may be briefly stated as follows: On May 10, 1911, Peterson and Lunn formed a partnership for the operation of what is referred to as the Crescent Hotel, in the city of Aberdeen. Lunn, after a few months, became dissatisfied and desired to return to Seattle. He thereupon disposed of his interest in the hotel to Hellgren and one Appleton, the former paying \$250 cash and giving the notes here involved, which Peterson indorsed. The Appleton note or notes are not involved in this proceeding. Hellgren and Appleton conducted the hotel for a time, when it was sold to one Johnson.

Peterson's contention is that the sale by Lunn of his interest to Hellgren and Appleton was colorable only, and that Lunn remained a partner of Peterson's and joined in the transfer to Johnson. Lunn's contention is that the sale was absolute and *bona fide*, that the partnership affairs between himself and Peterson were at that time settled and adjusted, and that he did not join in the transfer to Johnson.

This presents solely a question of fact. If the partnership affairs of Peterson and Lunn were settled and adjusted at the time of the sale to Hellgren and Appleton, Peterson is not entitled to prevail upon his counterclaim and has no right now to an accounting. The evidence upon this question was conflicting. While the trial judge, in his oral announcement at the conclusion of the trial, expressed some doubt as to which side should prevail upon the conflicting evidence, he subsequently made a finding that the allegations contained in the answer, affirmative defense, and cross-complaint of Peterson had not been proven, and entered judgment in favor of the respondent for the amount of the notes and the accrued interest.

After giving attentive consideration to all the evidence in the case, we are of the opinion that the finding and judgment of the trial court is in accord therewith. Since no question of law is involved in this case, it would serve no useful purpose to review in detail the evidence of the respective parties.

The judgment will be affirmed.

ELLIS, C. J., MORRIS, and CHADWICK, JJ., concur.

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[No. 14066. Department Two. July 31, 1917.]

J. W. FRERICH, *Respondent*, v. ROBERT ABRAMS, *Appellant*.<sup>1</sup>

DEEDS—PROPERTY CONVEYED—RENTALS—COVENANTS—EXCEPTIONS—RIGHT TO. A deed of leased premises with covenants against all claims except as to existing leases, and conveying title to rentals "due and owing," does not pass rentals previously paid to the grantor in advance for the last two months of the term, according to the terms of a duly recorded lease; since they were not due or owing and the grantee was bound to notice the lease.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 18, 1916, upon findings in favor of the plaintiff, in an action to recover claims for rentals, tried to the court. Reversed.

*W. H. Beatty and Hastings & Stedman*, for appellant.

*J. L. Corrigan*, for respondent.

FULLERTON, J.—The appellant, Robert Abrams, being the owner of an apartment house in Seattle, leased the same to tenants for a period of five years running from January 1, 1911, to December 31, 1915, at a rental of \$225, payable monthly in advance. The lease contained the following recitals:

"The said second parties have this day paid first party the sum of \$450 (in addition to the first months' rent in ad-

<sup>1</sup>Reported in 166 Pac. 792.

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vance) which said sum of \$450 is to be applied on the last two months of the term of this lease, and it is agreed that if default shall be made in any of the covenants of this lease, said sum of \$450 shall be forfeited to first party."

On May 25, 1915, the appellant, by a bargain and sale deed, conveyed the apartment house, together with other property, to his daughter, Mildred Colwell, in settlement of a contest between them over the estate of Mrs. Colwell's deceased mother. The deed covenanted "against all and every person or persons whomsoever lawfully claiming or to claim the same or any part thereof, except as to all leases now existing against aforesaid property." The deed also contained the further stipulation:

"It is understood and agreed as between the parties hereto that all moneys due and owing on the aforesaid properties, as rentals by reason of any leases now existing shall be the property of the party of the second part."

At the time the apartment house was conveyed to Mrs. Colwell, she made no demand for the \$450 paid at the time of the execution of the lease, but claims ignorance of the fact of its payment having been made. The lease, however, was spread upon the proper records of King county, affording constructive notice to all the world.

The tenants remained in possession until the end of their term, and the rentals were paid over to Mrs. Colwell subsequent to the execution of the deed, save for the last two months, the tenants claiming credit for the advance payment made by them to the appellant. Mrs. Colwell thereupon made demand upon her father for the \$450, claiming title thereto in virtue of her ownership of the fee during the time in which the rentals accrued. Payment was refused, whereupon she assigned her claim therefor, together with other demands not necessary to be considered here, to the plaintiff, J. W. Frerich, who brought an action thereon against the appellant. On a trial by the court, plaintiff was adjudged entitled to recover, and this appeal followed.

It is our opinion that the trial court erred in allowing the recovery sought. Undoubtedly, it is a general rule that a warranty against incumbrances in a conveyance of real property is breached if there be a valid, outstanding lease upon the property having a definite period yet to run. It is a general rule, also, that a conveyance of real property subject to an outstanding lease carries with it the rent accruing and becoming due after the conveyance, unless there be a special reservation of such rents. But the grantor in this conveyance, it seems to us, specially exempted himself from any liability that might arise from these general principles of law. That he exempted himself from liability arising from the covenants of warranty, there can be no question. The conveyance was expressly made subject to all leases then existing against the property. So with the clause concerning the rentals. While the clause is not in form an exception, it is so in effect. It designates what rentals shall pass by the conveyance, and thus precludes any implication that something more was intended, which might have arisen had the deed contained only the ordinary words of grant. The rentals passing by the deed are those only which are "due and owing" on the property. The rents for the last two months of the lease were neither due nor owing. They had been paid by the tenant at the time of the execution of the lease. True, the sum paid was subject, on a stated contingency, to another application. But the condition did not happen, and the payment became applicable on the last two months of the term of the lease. Being neither due nor owing, the grantee cannot recover the amount thereof from her grantor.

The rule is not affected by the fact that the grantee had no actual knowledge of the terms of the lease. The lease was not only specially mentioned in the deed through which she obtained title, but was an instrument subject to record and was properly recorded. It clearly expressed the terms of the contract, and the grantee was bound to notice its terms and conditions.

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Opinion Per MORRIS, J.

The judgment is reversed, and the cause remanded with instructions to enter a judgment omitting the item herein referred to. The appellant will recover costs on the appeal.

ELLIS, C. J., MOUNT, PARKER, and HOLCOMB, JJ., concur.

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[No. 14083. Department One. July 31, 1917.]

J. L. WETHERBY, *Appellant*, v. E. M. MARK *et al.*,  
*Respondents*.<sup>1</sup>

PRINCIPAL AND AGENT—RELATION—TERMINATION—EVIDENCE—SUFFICIENCY—NOTICE OF CANCELLATION. The evidence sustains findings that an agency was mutually cancelled on February 13, and the matter kept secret to give the agent an opportunity to dispose of cars on hand, where a letter was written February 26, evidently referring to such previous arrangement and requesting return of the contract, which the agent acquiesced in; and in such case the agent cannot insist upon the ten days' notice of cancellation provided for in the contract of employment.

Appeal from a judgment of the superior court for King county, Jurey, J., entered October 25, 1916, upon findings in favor of the defendants, in an action on contract, tried to the court. Affirmed.

*George F. Hannan*, for appellant.

*James B. Murphy*, for respondents.

MORRIS, J.—The question here to be determined is when was a certain contract between the parties cancelled. Respondents are general agents for the sale of Oakland automobiles. They gave appellant an agency for the sale of these automobiles in Pierce county, under a written contract which reserved to respondents the right to cancel the contract at any time upon giving ten days' notice to appellant. Respondents contend, as found by the lower court, that the con-

<sup>1</sup>Reported in 166 Pac. 1143.

tract was cancelled by the mutual agreement of the parties on February 13, but that, at the request of appellant, the matter was kept secret in order to give appellant an opportunity to dispose of the cars then on hand. Appellant endeavored to dispose of his business to Foulks & King. The parties could not agree upon the terms, and about February 26, 1916, respondents made a selling arrangement with Foulks & King under which two cars were delivered. On March 2, respondents sold four cars to a resident of Puyallup. Appellant then brought this action for commission on the sale of these six cars. If his contract was still in force at the time of the sale, he would be entitled to recover, otherwise not.

On February 26, respondents wrote the following letter to appellant:

"Seattle, Wash., February 26, 1916.

"Mr. J. L. Wetherby,

"Tacoma, Washington.

"Dear Mr. Wetherby:—Owing to the fact of your not being able to dispose of the Oakland cars in your territory during the past three months, and also of your decision not to continue the Oakland agency, it is with regret that I hereby notify you of the cancellation of your Dealer's Contract with the Northwestern Oakland Car Company, Seattle, in accordance with the conditions set forth in said contract, and I shall be pleased if you will return to us a copy of said contract now held by you. With best wishes for the future, we are,

Very truly yours,

"Northwestern Oakland Car Company,

"Per E. M. Mark."

Under this letter, appellant contends that his contract was not cancelled until ten days after the receipt of the letter, and as the cars were sold within that time, he is entitled to his commission. The case presents only a question of fact upon which the findings of the lower court are adverse to appellant. These findings are amply sustained by the evidence and it cannot be said there is a preponderance against



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them. The letter of February 26 is in itself evidence that the contract had been previously terminated and that the letter was intended, as contended by respondents, only as confirmation of prior negotiations. The letter refers to appellant's "decision not to continue the Oakland agency." This language can refer to nothing else other than to what had previously transpired between the parties on February 18. If appellant then surrendered his contract, he waived all rights under it and cannot insist on ten days' notice of its cancellation. That clause applies only in case when respondents, exercising their right under the contract, desire to terminate it without the consent of appellant. It does not apply to a situation such as is disclosed by the facts here, where appellant and respondents mutually rescinded and cancelled the contract. The contract having been terminated prior to the sale of the six cars, appellant is not entitled to commission on such sale.

Judgment is affirmed.

ELLIS, C. J., MAIN, and CHADWICK, JJ., concur.

[No. 14140. Department One. July 31, 1917.]

THE STATE OF WASHINGTON, *Respondent*, v. H. M. OWEN,  
*Appellant*.<sup>1</sup>

**INDICTMENT AND INFORMATION—DUPLICITY—PENDING PLEA.** The question of duplicity in an information can only be raised by demurrer or motion to quash, or by motion to compel an election, and same will not be entertained while a plea of not guilty is pending.

**CONSTITUTIONAL LAW—LEGISLATIVE FUNCTIONS.** Whether the seventh amendment to the state constitution is violative of U. S. Const., art. 4, § 4, guaranteeing a republican form of government, is a Federal question, and the Federal courts uniformly hold that the guarantee is of a political character exclusively committed to Congress and beyond the jurisdiction of the courts.

**UNITED STATES—REPUBLICAN FORM OF GOVERNMENT.** The admission by Congress of Senators and Representatives from this state since the adoption of the seventh amendment to the state constitution, conclusively recognizes the republican character of our state government under the amendment.

**COMMERCE—INTOXICATING LIQUORS—REGULATION OF STATES.** Rem. Code, § 6262-20, is not violative of the commerce clause of the Federal constitution, since the Webb-Kenyon act (U. S. Comp. St. 1916, § 8739) authorizes state legislation controlling interstate shipments of intoxicating liquors, and divests such shipments of their character of interstate commerce when violative of state law.

**SAME—OFFENSES — ILLEGAL TRANSPORTATION — EVIDENCE — SUFFICIENCY.** A conviction for transporting liquors not labeled as required by law, is sustained where it appears that the accused operated a jitney, and was hired by others to go to Montana, and returned with two half-gallon jugs and one five-gallon demijohn of whiskey in the car, none of the containers having the required permit attached, the accused lending himself and his car to the unlawful enterprise after having knowledge of the presence of the whiskey shortly after reentering this state.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered October 17, 1916, upon a trial and conviction of violating the prohibition law. Affirmed.

<sup>1</sup>Reported in 166 Pac. 793.

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*A. C. Shaw*, for appellant.

*John B. White*, for respondent.

ELLIS, C. J.—Defendant, Owen, and three other men were charged in the justice court, Spokane county, with a violation of §§ 15 and 20 of chapter 2 of Laws of 1915, pp. 10, 13, commonly referred to as initiative measure No. 3 (Rem. Code, §§ 6262-15, 6262-20). Section 15 prescribes the form of permit to be issued by the county auditor for the transportation of intoxicating liquor within this state, and provides,

“It shall be unlawful for any person to ship, carry or transport any intoxicating liquor within the state without having attached thereto or to the package or parcel containing the same, such permit, or to transport or ship under said permit an amount in excess of the amount or quantity hereinbefore limited.” Rem. Code, § 6262-15.

Section 20 (Id., § 6262-20) makes it unlawful to transport or receive within this state any intoxicating liquor unless the parcel or package containing such liquor be clearly and plainly marked in large letters: “This Package Contains Intoxicating Liquor.”

The charging part of the complaint here involved is as follows:

“That on or about the 9th day of June, A. D. 1916, in the county of Spokane, state of Washington, the said defendants, J. W. Critzer, M. H. Owen, B. M. Barton and Cornelius Oosterveer, then and there being, did then and there wilfully and unlawfully transport and carry from the state of Montana and bring into the state of Washington and into Spokane county, Washington, and did then and there have in their possession 6½ gallons of whiskey contained in one five gallon demijohn, two one-half gallon glass demijohns, and two quart bottles without the said packages containing said whiskey being marked as required by law and without any permits being attached thereto, as required by law, and the said quantity of whiskey being in excess of the quantity permitted to be in possession of said defendants, contrary to the

statutes in such case made and provided and against the peace and dignity of the state of Washington."

Critzer and Oosterveer pleaded guilty and were fined by the justice. Barton and defendant stood trial, were convicted, and appealed to the superior court, where Barton also entered a plea of guilty and was fined. Defendant Owen pleaded not guilty, stood trial, was by the jury found guilty as charged, and was by the court sentenced to pay a fine of \$200 and costs. From the judgment of conviction and sentence, he prosecutes this appeal. The evidence will be noticed in the course of our discussion.

First, contending that the complaint made several distinct charges, appellant, at the opening of the trial, but without withdrawing his plea of not guilty, moved the court to compel the state to elect whether he should be tried (1) for having in his possession whiskey without a permit, or (2) for having in his possession whiskey with a permit but in excess of the permitted quantity, or (3) for transporting or carrying within the state whiskey without a permit, or (4) for so transporting or carrying whiskey with a permit but in excess of the permitted quantity. The overruling of this motion is assigned as error. The question of duplicity can only be raised by demurrer or motion to quash in the nature of a demurrer or by motion to compel an election. But such demurrer or motion cannot be entertained while a plea of not guilty is pending. The motion was properly overruled. *State v. McBride*, 72 Wash. 390, 130 Pac. 486; *State v. Phillips*, 65 Wash. 324, 118 Pac. 43; *State v. Blanchard*, 11 Wash. 116, 39 Pac. 377.

Next, contending that the seventh amendment to the state constitution providing for the initiative and referendum is void as violative of § 4, art. 4, of the Federal constitution guaranteeing to every state a republican form of government, and that initiative measure No. 3, enacted pursuant to that amendment, is therefore void, appellant again objected to the introduction of any evidence. The overruling of this

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ground of objection is assigned as error. So far as it presents a question within the cognizance of any court, this presents a Federal question, and the Federal supreme court has uniformly held that the constitutional guaranty of a republican form of government is of a political character exclusively committed to Congress, and as such is beyond the jurisdiction of the courts. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U. S. 118.

In this particular contention appellant is not asserting an infringement of any of his own constitutional rights. As pointed out in the case above cited, the assault made by the contention here advanced is not on the law as a law, "but on the state as a state. It is addressed to the framework and political character of the government by which the statute . . . was passed," not to the statute itself. See, also, 6 R. C. L. 44 and 45, and cases there cited, and note 50 L. R. A. (N. S.) 196 and 197. Congress, the body to which the matter is exclusively committed, has foreclosed the question by admitting into the councils of the Union senators and representatives from this state ever since the adoption of the seventh amendment to our constitution, thus recognizing the republican character of our state government notwithstanding that amendment. *Pacific States Tel. & Tel. Co. v. Oregon*, *supra*.

Appellant further asserts that § 20 of initiative measure No. 3 (Id., § 6262-20) is violative of the commerce clause of the Federal constitution and of the act of Congress of March 1, 1913, known as the Webb-Kenyon act. [U. S. Comp. St. 1916, § 8739.] In what respect it is conceived that this section violates any provision of the Webb-Kenyon act, counsel has not made plain. The question, however, is no longer an open one. In *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, Ann. Cas. 1917B 845, L. R. A. 1917B 1218, the Federal supreme court, holding that act constitutional, construed it as authorizing legislation by the several states prohibiting, regulating or controlling interstate ship-

ment or transportation of intoxicating liquors.' By the Webb-Kenyon act, the shipment or transportation of such liquors is divested of its character of interstate commerce whenever violative of the state statute. *State v. Great Northern R. Co.*, ante p. 187, 165 Pac. 1073; *State v. Warburton*, ante p. 242, 166 Pac. 615; *Gottstein v. Lister*, 88 Wash. 462, 158 Pac. 595.

Finally, it is contended in a general way that the evidence was insufficient to sustain a conviction and that a verdict of acquittal should have been directed, or at least a new trial should have been granted. The undisputed evidence shows that appellant was part owner of, or as he expressed it, had an interest in an automobile which he operated as a jitney for hire in and about the city of Spokane. He was approached by Barton, apparently acting for Oosterveer and Critzer, and agreed to take these men in this car on a journey for a consideration of \$40, which he said he did not know whether he had received at the time of trial or not. He took Barton along, as he said at one time, to help him drive, and at another, merely because Barton wanted to go. At any rate he admitted that Barton did, from time to time, relieve him at the wheel. He claimed that he did not know where he was hired to go, but was told sometime after starting that the destination was Troy, Montana, where Oosterveer and Critzer expected to buy a hotel. At one time he said Barton told him the journey was to be a fishing trip. He testified that the party left Spokane at about seven o'clock in the morning and reached Troy, Montana, about nine o'clock that night. He and Barton took dinner at a restaurant, and after overhauling the car and reinflating the tires, looked for the other two men, finally locating them in a saloon. Soon afterwards the party started on the return to Spokane, appellant and Barton occupying the front and the other two men the back seat. Appellant claimed that he did not then know that there was any whiskey in the car. The party traveled all night, and at about six o'clock next morning near Newport,

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Washington, an axle of the machine broke and a new one was ordered from Spokane. Appellant claims that, at this time, he discovered two half-gallon jugs of whiskey in the automobile and a wooden box, which box Oosterveer and Critzer took out of the machine and left in the woods. He also reluctantly admitted that he then discovered a five-gallon demijohn which he thinks had theretofore been encased in the box, but did not know that it contained whiskey. He testified that the two half-gallon jugs then had permits attached to them. The new axle arrived about three o'clock in the afternoon, and the party resumed their journey with Barton at the wheel and appellant sitting beside him. At Mead, Washington, they were met by two deputy sheriffs in an automobile, dashed past them, were pursued by them and finally overtaken and placed under arrest at Hillyard. The deputies found the two half-gallon jugs of whiskey in the front end of the car under appellant's feet, and a five-gallon wicker covered demijohn of whiskey sitting in the back of the car between Oosterveer and Critzer. None of these containers had a permit attached and none of them was marked "This Package Contains Intoxicating Liquors."

Such is the purport of the evidence, and we think it amply sufficient to sustain the verdict. The jury was justified in believing that none of the containers of the whiskey ever had a permit attached, and it is not claimed that either of them was ever marked as required by law. Even assuming that appellant did not know of the presence of the whiskey till shortly after entering the state of Washington at six o'clock in the morning, an assumption which taxes credulity, he knew it then, but continued to lend himself and his machine to the prosecution of what he then must have known was an unlawful enterprise. He was thenceforth an aider and abettor, and as such punishable as a principal. Rem. Code, § 2260.

The judgment is affirmed.

HOLCOMB, MORRIS, MAIN, and CHADWICK, JJ., concur.

[No. 14278. Department Two. July 31, 1917.]

**THE STATE OF WASHINGTON, *on the Relation of*  
*F. E. Warner, Plaintiff*, v. THE SUPERIOR COURT  
FOR CHELAN COUNTY, *Respondent*.<sup>1</sup>**

**MORTGAGES—FORECLOSURE—SALE—POSSESSION—RIGHTS OF SECOND MORTGAGEE—WRIT OF ASSISTANCE.** Where a second mortgagee foreclosed against the mortgagors only, and prior to his obtaining possession as purchaser under the sale, a prior mortgage was foreclosed and the purchaser at such sale obtained possession, the second mortgagee has rights as a redemptioner only, and is not entitled to a writ of assistance to put him in possession.

**CERTIORARI—APPLICATION—STATEMENT OF GROUNDS.** A writ of certiorari to review error will not be granted, unless the application points out the specific error committed, when none appears on the face of the record, and it is not sufficient to state that the action "was erroneous and not according to the rules of the common law."

Application filed in the supreme court July 3, 1917, for a writ of certiorari to review an order of the superior court for Chelan county, Grimshaw, J., denying a writ of assistance. Denied.

*O. P. Barrows*, for relator.

*Arthur G. Morey*, for respondent.

MOUNT, J.—This is an application for a writ of certiorari to review an order of the superior court of Chelan county denying to the relator a writ of assistance for the possession of certain real estate.

The facts, as shown by the application and the answer thereto, are substantially as follows: On the 6th day of January, 1915, Selena Shantz and F. E. Shantz executed their three promissory notes, aggregating \$850, in favor of the relator. These notes were secured by a second mortgage upon an orchard tract of farming land then owned and occupied by the makers of the notes and mortgage. This mort-

<sup>1</sup>Reported in 166 Pac. 791.



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gage was subject to another mortgage of \$4,000, then of record, in favor of Veronica Cressman. On January 15, 1916, one of the notes held by the relator becoming due, relator brought an action to foreclose his mortgage for the amount of the notes—\$850, with interest, costs, and attorney's fees. The makers of the notes and mortgage were the only parties defendant. Thereafter a decree of foreclosure was entered, and on May 20, 1916, the property was sold to satisfy the relator's mortgage, and was bid in by him for the sum of \$400. This sale was afterwards confirmed. In the meantime, on April 27, 1916, Mrs. Cressman brought an action to foreclose her mortgage for \$4,000. The makers of the mortgage and the relator, F. E. Warner, were made parties defendant. The mortgagors did not resist the foreclosure. It was resisted only by the relator, Warner, and a decree was entered adjudging this \$4,000 mortgage to be a prior mortgage and ordering a sale of the property to satisfy the same. This sale was had on March 24, 1917. After this sale, Mrs. Cressman, who bid in the property for the face of her mortgage, went into possession of the property by consent of the mortgagors, and now has possession. On May 28, 1917, this relator applied to the superior court of Chelan county, where the property was situated, for a writ of assistance to put him in possession under his sale made pursuant to the foreclosure of the \$850 mortgage. The trial court denied the writ of assistance, and he now applies to this court for a writ to review that order. No specific error of the trial court in denying the writ of assistance is pointed out. The applicant states

"That the action of said court in refusing to grant said writ of assistance as aforesaid was erroneous and not according to the rules of the common law."

Upon the record before us, it is plain that the relator had a subsequent mortgage upon the property in question. He foreclosed that mortgage, bid the property in, and the sale was confirmed by an order of the court. Prior to the time

he obtained possession, a prior mortgage was foreclosed—the relator being a party defendant in that foreclosure—the property was sold, and the prior mortgagee bid in the property and took possession thereof by consent of the mortgagors.

It seems too plain for argument that the relator here has the rights of a redemptioner only. Until such redemption, he clearly has no right to possession of the mortgaged premises ahead of the prior mortgagee, who has foreclosed her mortgage, bid in the property at the foreclosure sale, and is now in possession of the premises. This seems plain upon the face of the record. If the trial court erred in denying the writ of assistance, the error is not pointed out in the application for the writ. A statement that the action of the court “in refusing to grant said writ of assistance as aforesaid was erroneous and not according to the rules of the common law” is not sufficient to point out a specific error when none appears upon the face of the record.

“In the absence of special statutory provisions it is well settled that before the court will grant the writ it must appear not only that the inferior tribunal has committed some error of law, but also that the error has caused substantial harm, and that the petitioner has been guilty of no laches in seeking his remedy. The common rule is that where the relator shows no equity, and, so far as his legal rights go, no injury not remediable at law, it is proper to deny the use of the writ.” 5 R. C. L. 255.

See, also, 6 Cyc. 784, and cases there cited.

We are satisfied that no sufficient cause is shown for the issuance of the writ, and the application is therefore denied.

ELLIS, C. J., HOLCOMB, PARKER, and FULLERTON, JJ., concur.

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[No. 13863. Department One. August 3, 1917.]

K. E. NORDLUND, *Appellant*, v. MARIE C. NORDLUND,  
*Respondent*.<sup>1</sup>

DIVORCE — RECRIMINATION — EVIDENCE — SUFFICIENCY. Where the wife makes no claim or proof of misconduct on the part of the husband, it is error to deny the husband's application for divorce on the ground that his conduct with a young woman employee, whom he had taken out a few times, constituted such cruelty upon his part as to deprive him of the right to complain.

DIVORCE—GROUNDS—DENIAL OF INTERCOURSE. The wife's denial of sexual intercourse for twelve years without justification is ground for divorce, under Rem. Code, § 982, authorizing a divorce for cruel treatment or personal indignities rendering life burdensome, or for any other cause deemed by the court sufficient and the court shall be satisfied that the parties can no longer live together.

PLEADING—COMPLAINT—DEFINITENESS. After issue joined, without moving for a more specific statement, objection to the sufficiency of a complaint on that ground cannot be made.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 1, 1916, upon granting a nonsuit, dismissing an action for divorce, tried to the court. Reversed.

*Jay C. Allen* (*Philip Tindall*, of counsel), for appellant.

*Saunders & Nelson*, for respondent.

MORRIS, J.—Appeal from a judgment of dismissal granted at the conclusion of appellant's case in chief. The action is for divorce, the complaint reciting a long list of grievances upon which the decree was sought. No more of this tale of domestic infelicity will be recited than is necessary to an understanding of the conclusions reached. The parties are forty-six years of age and were married in December, 1894. A prior action was begun by appellant in April, 1915, which was dismissed at the suggestion of the then trial judge that the parties make another attempt to adjust their differences

<sup>1</sup>Reported in 166 Pac. 795.

and live harmoniously. The attempt seems to have been a failure, and this action was commenced in March, 1916. Appellant testified that respondent had frequently accused him of improper conduct with other women, had called him a "whore pimp," had accused him of associating with vile and dissolute persons, said his place of business was not respectable, that the men of his family were dissolute, that appellant had stolen money to give to his whores, and that for the past twelve years she had, without cause, refused him sexual intercourse. Other charges are made, but these are sufficient for the purpose of this opinion.

During the trial, appellant, who was a photographer, admitted that on occasions he had taken one of his female employees to a restaurant and had driven her from her home to his studio in his auto. No issue was made as to any misconduct with this young woman on the part of appellant. In fact such charge was expressly disavowed by counsel for respondent, as appears from the following reference to the record. On appellant's cross-examination, counsel for respondent inquired of him how often he had taken this young lady out in his auto, to which objection was made as not in the issues. Counsel for respondent then said: "His wife is not charging him with adultery. I believe he is an honest man, and there is no such thing as adultery in this case. I will say that now." At the close of appellant's case, the lower court dismissed his action upon the ground that appellant's conduct with this young woman was improper and constituted such cruelty as to deprive him of the right to complain of the conduct of his wife. In this we think the lower court was in error.

It is not necessary to say what conduct upon the part of a husband in associating with other women will deprive him of the right to seek a divorce from his wife. There is in this case neither allegation, claim or proof of any such misconduct. Had the wife sought a divorce because of the husband's relations with this young woman, her case would have

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fallen far short of a recovery, so far as the record now stands. It may be that, if respondent had gone into her case, she might have shown far more than appellant admitted on his cross-examination, which is now all that is before us and which, in our judgment, is insufficient upon which to base any affirmative relief. Touching appellant's case irrespective of the conduct of respondent in other respects, whether sufficient or insufficient to grant the relief prayed for, there is one line of testimony sufficient to put respondent to a defense, and that is the denial of sexual intercourse for twelve years. The sexual relation between husband and wife is one of the most delicate things courts have to deal with. For this reason, the cases differ as to whether or not the marriage should be dissolved because of the refusal of sexual intercourse upon the part of either spouse. Some courts say the refusal of this privilege is only the denial of a single conjugal right, and of itself imports no cessation of cohabitation which is deemed necessary before it can be said that there has been such misconduct as to entitle the aggrieved party to a divorce. Most of these cases are based upon the wording of divorce statutes; as in Maine, where in *Stewart v. Stewart*, 78 Me. 548, 7 Atl. 473, 57 Am. Rep. 822, it was said such a denial is not "utter desertion" within the meaning of the Maine statute, though one of the judges, in a concurring opinion, says it may be cruelty. In Illinois, Florida, Iowa and Massachusetts, it has been held that such a denial is not wilful desertion. *Fritts v. Fritts*, 138 Ill. 436, 28 N. E. 1058, 32 Am. St. 156, 14 L. R. A. 685; *Prall v. Prall*, 58 Fla. 496, 50 South. 867, 26 L. R. A. (N. S.) 577; *Pfannebecker v. Pfannebecker*, 133 Iowa 425, 110 N. W. 618, 119 Am. St. 608; *Southwick v. Southwick*, 97 Mass. 327, 93 Am. Dec. 95.

In *Cowles v. Cowles*, 112 Mass. 298, it was held not to be cruelty under a statute in which cruelty must be such as to cause injury to life or health or to cause danger of such injury or cause a reasonable apprehension of such danger. Such refusal is held to be cruelty in Michigan, *Campbell v.*

*Campbell*, 149 Mich. 147, 112 N. W. 481, 119 Am. St. 660, and in Oregon, *Sisemore v. Sisemore*, 17 Ore. 542, 21 Pac. 820. Bishop supports divorce upon this ground. 2 Bishop, *Marriage and Divorce*, § 1682. Though all the cases do not sustain the view of the author, the citation is worthy of note as the view of an eminent student of domestic relations. Our statute, upon which our conclusion must be reached, differs from those of those states upon which divorces upon this ground have been denied. It recites that divorce may be granted upon the following cause:

“Cruel treatment of either party by the other, or personal indignities rendering life burdensome. . . .

“And a divorce may be granted upon application of either party for any other cause deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together.” Rem. Code, § 982.

Under this statute, we have no hesitancy in saying that respondent's denial of sexual intercourse for twelve years without sufficient ground or cause is ground for divorce. In *Gibson v. Gibson*, 67 Wash. 474, 122 Pac. 15, the denial of sexual intercourse for six months immediately after the marriage was found as one of the facts, upon which the court based a finding of cruelty sufficient to entitle the complaining party to divorce. In the language of some of the cases, the frequency of sexual indulgence between husband and wife is more a question of conscience than of law, and for this reason the courts have not attempted to lay down any standard the violation of which would be ground for the severance of the marriage relation. While this is true, it must likewise be true that the law can say that, under a statute like ours, the denial of a desire so strongly implanted in human nature and an unquestioned marital privilege is the denial of that harmony and unity which lies at the very root of the marriage relation and tends to that which renders life burdensome and, under our statute, is a cruelty sufficient to satisfy the court that the parties can no longer live together. It may be the

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respondent was justified in her denial. If so, she should establish such justification. Accepting appellant's testimony, as we must, we think there was enough to put respondent to a defense.

Respondent argues that the complaint is insufficient to grant appellant the relief prayed for. As against such objection now made, or at the time of the trial, the complaint was sufficient. It may be that, had respondent endeavored to have obtained a more specific statement of appellant's charges, such relief might have been granted. But failing in so moving, the complaint was sufficient after issue joined. The brief of respondent in support of the judgment says:

"So the repeated attentions of the plaintiff to a young and unmarried woman at the expense of that portion of his time to which his wife and family were justly entitled assume the proportions of a sin against the marriage which he seeks to dissolve."

Whatever may be the facts, the record fails to disclose that appellant's relation with the young woman referred to was such as to charge him with "a sin against the marriage relation." Charges of this character should be proven clearly, not intimated and suggested, and until such proof is made, appellant is entitled to such relief as the facts and law warrant.

Reversed, and remanded for further proceedings.

ELLIS, C. J., MAIN, and CHADWICK, JJ., concur.

[No. 13953. Department One. August 3, 1917.]

W. H. COWEN, *Respondent*, v. JOHN H. CULP *et al.*,  
*Appellants*.<sup>1</sup>

**JUDGMENT—IN ANOTHER STATE ON WARRANT OF ATTORNEY.** Under the full faith and credit clause of the Federal constitution, judgments upon confession under warrant of attorney are valid here when rendered in strict conformity with the power and in the state where the debtor resided when the warrant was executed, and are not open to collateral attack.

**SAME—ON WARRANT OF ATTORNEY—VALIDITY—PRESENT INDEBTEDNESS.** A judgment upon confession under warrant of attorney is founded upon the fact of present indebtedness, and payment of the note before judgment would render the judgment void and subject to attack in any court.

**BILLS AND NOTES—ACTIONS—DEFENSES—PAYMENT—SUFFICIENCY OF PLEADING.** An allegation that defendants were sureties upon a note and that plaintiff agreed to collect the note from the maker and notify the sureties if it was not paid at maturity and that plaintiff failed to do so, and by reason thereof the note was paid, is not good as a plea of payment, the only plea of payment being a conclusion.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered February 24, 1916, upon findings in favor of the plaintiff, in an action to recover upon a foreign judgment, tried to the court. Affirmed.

*Crollard & Crollard* and *Frank Reeves*, for appellants.

*Ludington & Shiner*, for respondent.

**MORRIS, J.**—Respondent sues as the assignee of a judgment obtained in the state of Ohio upon a promissory note, which judgment was entered after the removal of appellants to this state, on a warrant of attorney contained in the note authorizing any attorney to appear in any court of record of the state of Ohio and, waiving process, confess judgment for the amount due upon the note. Appellants filed, among other pleadings, an amended answer in which, in so far as it is now

<sup>1</sup>Reported in 166 Pac. 789.



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material, they admit the execution of the note by one Sowers as maker and themselves as sureties. They then alleged an agreement, entered into at the time of the execution of the note, whereby the payee agreed to exhaust all legal remedies to collect the note from the maker before calling upon the appellants as sureties. It was then alleged that the payee agreed to notify appellants if the note was not paid at maturity; that the payee failed to notify appellants at the maturity of the note that it was not paid, and continued in such failure until his death, some thirteen years thereafter. They then alleged that, by reason of the above agreement with the payee and the failure to receive notice of its nonpayment, the note was paid by the maker at its maturity. It is further alleged that, for some reason unknown to appellants, the note was not surrendered to the maker at the time of its payment and that respondent's assignor did not acquire the note in good faith, was not a holder in due course, and the action in the Ohio court was without right or authority in law.

At the trial, appellants asked leave to file a second amended answer in which they set forth the same agreements upon which they alleged payment as in the amended answer, with a further allegation that all the proceedings in the Ohio court were a fraud upon that court. Permission to file this second amended answer was denied, and such ruling is the first error assigned. During the trial, appellants offered to prove, "in conformity with the allegations of the answer," that the note had been paid, which offer was denied. Later on a second offer was made for the purpose, as stated by counsel, of attacking the jurisdiction of the Ohio court, in which appellants offered to prove, as in the first offer and in addition, that the assignor of respondent knew that the note was paid at maturity and procured the confession of judgment upon the warrant of attorney with such knowledge. This offer was also denied, and such ruling is the second error complained of.

In common with most courts, we have held that, under the full faith and credit clause of the Federal constitution, judgments rendered upon confession under warrant of attorney are valid here when rendered in strict conformity with the power and in the state where the debtor resided when the warrant was executed. *Miller v. Miller*, 90 Wash. 333, 156 Pac. 8. It is also the general rule that such judgments are not open to collateral attack for fraud. *Safe-Deposit & Trust Co. v. Wright*, 105 Fed. 155.

The warrant of attorney to confess judgment is founded upon the fact of a present indebtedness. If there be no present indebtedness, the warrant fails, and any judgment entered upon such a warrant after payment of the note would, under the authorities, be void and subject to attack in any court in any proceedings. 1 Black, Judgments, 88, 89; *First Nat. Bank of Danville v. Cunningham*, 48 Fed. 510; *Rea v. Forrest*, 88 Ill. 275. If, therefore, appellants could show payment of this note before the entry of the Ohio judgment, it would be a good defense to the action here upon that judgment. It does not seem to us, however, that there was either plea or offer of such proof. The amended answer contained no plea of payment as a fact. It merely recited an agreement to collect the note from the maker or to notify the appellants in case such collection was not made, and inasmuch as appellants had not been notified by the payee of the failure of the maker to pay the note when due, they believe the note was paid. The only plea of payment, if it can be called such, rested in the conclusion of the appellants that, inasmuch as appellants were not notified of the failure of the maker to pay, the note was paid.

Assuming that appellants would, if permitted, have testified to all the facts they alleged in this answer as to the agreement alleged with the payee, it is questionable whether or not such testimony would have been received under § 1211, Rem. Code, since respondent held the note for collection only, under an assignment from the administrator of the estate of

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the payee. See, also, *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941, as to the admissibility of collateral agreements exempting from liability. It is not, however, necessary to decide this query now. Such testimony, if admissible, would not have established the payment of the note. Payment as an affirmative defense must be proven as any other affirmative defense, and proof of the agreement alleged and the failure to receive notice would be received by no court as proof of payment. Appellants' offer to prove payment was no broader than their plea. The offer is "in conformity with the allegations of the answer." That is, they would offer proof, if permitted, of the agreement with the payee and the failure to receive notice, from which testimony the court would be asked to base a finding of payment. The second amended answer, while somewhat larger in its scope, was no broader upon the plea of payment than the amended answer.

For the purpose of attacking the jurisdiction of the Ohio court, it contained further allegations of knowledge of the fact upon the part of the judgment creditor in the procurement of the confession. Such knowledge would be an undoubted good defense under the authorities if it could be established by competent evidence, but one that would not be proven by evidence of the agreement and failure to receive notice. We therefore conclude that appellants were in no wise prejudiced by the refusal of the court to permit the filing of the second amended answer nor in the denial of the offers of proof.

Judgment is affirmed.

ELLIS, C. J., MOUNT, MAIN, and CHADWICK, JJ., concur.

[No. 14104. Department One. August 3, 1917.]

GLADIE M. LARSON, *Administratrix etc.*, Appellant, v.

J. L. ANDERSON, *Respondent*.<sup>1</sup>

CHattel MORTGAGES—FORECLOSURE—SALE—TITLE OF PURCHASER—SHERIFF'S BILL OF SALE TO ASSIGNEE—VALIDITY. Where a chattel mortgage was foreclosed and the property bid in for the mortgagee by an agent acting under power of attorney and the sheriff's return so showed, but the mortgagee died before bill of sale, whereupon the agent under the power of attorney assigned the property, and the sheriff's return was altered to show sale to the assignee, the sheriff's bill of sale to the assignee did not pass the title as against the estate of the mortgagee; since the title passed by the sale to the mortgagee, whose death revoked the power of attorney, rendering the assignment valueless, and no act of the sheriff thereafter could affect the title; in view of Rem. Code, §§ 1107, 1108, providing that the purchaser at chattel mortgage foreclosure sales shall take all the interest of the mortgagor in the mortgaged property.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 26, 1916, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for conversion. Reversed.

*P. W. Willett* and *O. L. Willett*, for appellant.

*Byers & Byers* (*Robert B. Walkinshaw*, of counsel), for respondent.

MORRIS, J.—Appeal from a judgment notwithstanding the verdict. The jury having found in favor of appellant upon all the controverted facts, we only have to examine the record to ascertain whether the verdict can be sustained upon the facts and is not contrary to law. Hence a complete summary of the facts need not be given.

Looking first to the facts supported by the evidence of appellant, we find that, prior to March, 1915, B. F. Richardson held a chattel mortgage upon the steamer City of Bothell, a small boat plying the waters of Lake Washington. The mort-

<sup>1</sup>Reported in 166 Pac. 774.

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gagor being in default, the mortgage was foreclosed and the steamer sold under foreclosure. The first controversy arises as to the purchaser at the foreclosure sale. The property was bid in by E. J. Pettys, representing the mortgagee under power of attorney, for \$2,300. A number of witnesses testified that, after the sale, the deputy sheriff in charge of the sale inquired of Pettys for whom he was bidding and was informed the bid was for Richardson, the mortgagee. The deputy had with him at the time of the sale a memorandum showing the amount due upon the mortgage, principal, interest and costs. He indorsed upon this memorandum "sold to plaintiff," and returned it to the sheriff's office with the notice of foreclosure under which the sale had been conducted. Richardson died March 17, 1915, and on March 22, Pettys, as attorney in fact for Richardson, assigned to respondent, Anderson, "all right, title and interest to the steamer City of Bothell purchased from the sheriff" at the foreclosure sale. The consideration of this assignment was \$1,620, \$120 in cash and three notes for \$500 each. On the same day the sheriff executed a bill of sale of the boat to Anderson, under which he now claims. In addition to claiming under the bill of sale, Anderson contends that, under an agreement between Pettys and himself, Pettys purchased the boat for him at the foreclosure sale. Appellant having been appointed administratrix of the estate of Richardson, brought this action to recover the value of the boat, alleging a conversion by Anderson. As previously stated upon the facts, the verdict was in her favor. The trial judge, however, was of the opinion that the sheriff's bill of sale transferred the title to Anderson, and set aside the verdict and granted the judgment appealed from.

Accepting the facts as found by the general verdict for appellant, we find no reason for setting aside the verdict and granting judgment for respondent. In this state a chattel mortgage gives the mortgagee an equitable lien upon the property mortgaged, title remaining in the mortgagor. When, under the terms of the mortgage, the mortgagor is in

default, the mortgagee is given the right to foreclose and sell the property to satisfy his lien. The function of a foreclosure and sale is to officially declare forfeiture of the mortgagor's title for condition broken and transfer the title as a result thereof. 5 R. C. L. 464. When this mortgage was foreclosed and the steamer sold, the title passed with the sale, and the jury having found that Richardson was the purchaser at the sale, the title to the boat passed to him. Richardson died March 17. His death revoked his power of attorney given to Pettys, and the assignment to Anderson under this power of attorney on March 22 was valueless.

The bill of sale from the sheriff to Anderson is based upon this assignment and upon what is termed the return of sale in which Anderson is described as "J. L. Anderson, assignee." The evidence of appellant is to the effect that, in the return of sale as originally made by the sheriff, the name B. F. Richardson appeared as the purchaser at the sale and so appeared upon an examination of the sheriff's files "between the latter part of March and the middle of May, 1915." There is also evidence that the name of the purchaser as originally given in the return of sale has been erased and the name "J. L. Anderson, assignee," substituted. An inspection of the return plainly evidences an erasure, though what was erased cannot be determined.

Respondent contends, as held by the lower court, that, irrespective of the finding of the jury upon the facts, the bill of sale establishes and perfects title in respondent, and appellant has no right in law, at least in this form of proceeding, to question his title. If, as found by the verdict, Richardson was the purchaser at the foreclosure sale, then the title to the boat as well as the right of possession passed to him, and upon his death and the appointment of appellant as the legal representative of his estate, full power and warrant was given in law to wage an action such as this, the purpose of which is to restore to the estate that which in fact and law belongs to it.

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We are unable to agree in the contention of respondent that, under our law, the bill of sale fixed the title as between appellant and respondent. Section 1107, Rem. Code, provides that sales of property under chattel mortgage foreclosure shall be conducted in like manner as sales under execution. Section 1108 provides that the purchaser at such sales shall take all interest which the mortgagor has in the mortgaged property. Section 1109 provides that the officer conducting the sale shall execute a bill of sale of the property to the purchaser "which bill of sale shall be effectual to carry the whole title and interest purchased." Respondent pins his faith to this last clause, arguing "the bill of sale is not a mere acknowledgment of payment. It is not merely optional. It is the very medium itself through which the title is transferred." Such a construction overlooks § 1108, under which the title of the mortgagor passed to the purchaser at the mortgage sale. Section 1109 is nothing more than a statement of the procedure to be followed by the officer conducting the sale to evidence the result of the sale, and the clause "shall be effectual to carry the whole title and interest purchased," presupposes the whole title has been purchased and passed under § 1108, and the bill of sale is for the purpose of speaking the consequence or result of what has already taken place. If the title passed by the bill of sale, what becomes of the title passed to the purchaser at the sale, and where was the title between March 1, the day of the sale, and March 22, the date of the bill of sale? There can be but one answer, and that is, as found by the jury, that the title passed to Richardson at the sale, and at his death on March 17, to his estate, and no action of the sheriff could take it away from his estate and transfer it to Anderson. The provision of § 1107, to the effect that sales under foreclosure shall be conducted in the same manner as sales under execution, refers only to the manner of sale. In each case the title passed by the sale, and the bill of sale is only evidence of the sale and not the title itself.

There is no merit in respondent's contention in regard to the failure of appellant to make a tender of the amount paid by Anderson. Appellant tendered all that came to the estate, which was all that she was required to do.

Respondent's motion to strike the statement of facts is denied. It is based upon the contention that the statement of facts as proposed by appellant was so deficient as to make it necessary for respondent to file a new statement in order to properly present the record on appeal. Appellant's statement was sufficient to present all the material facts relevant to questions raised on the appeal. If respondent deemed it insufficient, the remedy was by amendment.

Judgment reversed and remanded with instructions to enter judgment on the verdict.

ELLIS, C. J., MAIN, and CHADWICK, JJ., concur.

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[No. 13992. Department One. August 3, 1917.]

*In the Matter of the Estate of B. F. RICHARDSON.*

GLADIE M. LARSON, *Administratrix, Appellant*, v. ANDERSON  
STEAMBOAT COMPANY, *Respondent*.<sup>1</sup>

EXECUTORS AND ADMINISTRATORS—CLAIMS—PRESENTATION AND PAYMENT—JUDGMENTS. Under Rem. Code, § 1483, providing an orderly method for the presentation and payment of claims against estates, the same must be followed and claim presented for a judgment for costs, rendered against an administratrix in her action brought against the claimant.

APPEAL—ORDERS APPEALABLE—FINAL ORDERS. An order in probate, upon a citation to compel payment of judgment for costs, requiring the administratrix to pay the costs and providing, in case of default, that her letters "are hereby revoked," is a final order and appealable.

Appeal from an order of the superior court for King county, Dykeman, J., entered October 17, 1916, directing

<sup>1</sup>Reported in 166 Pac. 776.



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the payment of a claim against the estate of a decedent, after a hearing before the court. Reversed.

*P. W. Willett and O. L. Willett*, for appellant.

*Byers & Byers*, for respondent.

MORRIS, J.—This proceeding is a side issue to *Larson v. Anderson*, ante p. 484, 166 Pac. 774. The Anderson Steamboat Company was made a defendant in that action but was dismissed from the case. It thereupon filed a cost bill, and its costs were subsequently taxed in the sum of \$38.60. On April 29, 1916, the Anderson Steamboat Company filed a petition in the probate proceedings setting forth its claim for costs, that the same had not been paid, and praying for the issuance of a citation to the administratrix to show cause why an order should not be entered requiring payment of these costs. Citation was issued, and on the return day the administratrix appeared and made a showing that she was not in possession of funds of the estate out of which these costs could be paid. The matter was continued until October 16, when the administratrix made a further showing of no funds and no property in the estate within the jurisdiction of the court, other than the chose in action then being prosecuted against J. L. Anderson. Respondent then filed an affidavit of his counsel setting forth that appellant was not the general administratrix of the estate of B. F. Richardson; that such administratrix was Sarah M. Richardson; that said estate was solvent and possessed of sufficient funds to pay respondent's claim. The facts are that B. F. Richardson died in the state of Indiana, where his wife was appointed administratrix of his estate. Subsequently appellant here was appointed administratrix with the will annexed for the purpose of prosecuting the action of *Larson, Administratrix, v. Anderson*. The inventory shows the only property of the estate listed by the administratrix is "a chose in action against the Anderson Steamboat Company, a corporation, and J. L. Anderson for damages for conver-

sion." This proceeding came on for hearing on October 17, when the lower court made and entered an order directing the appellant to pay the Anderson Steamboat Company its costs as taxed, "and in the event that the said administratrix fails and neglects or refuses to pay said sum on or before 5 o'clock p. m. of October 17, 1916, that her letters of administration be and the same hereby are revoked, cancelled and set aside." From this order, the appeal is taken.

Our probate practice affords an orderly method for the presentation and payment of claims against estates, even though, as here contended, the claim presented is in the form of a judgment against the administratrix. Rem. Code, § 1483. Respondent argues that a different rule should apply where the court has taxed costs against the administratrix and thus in effect judicially determined the status of the matter. The answer is that the statute affords but one method and that method must be followed.

It is further contended that the order appealed from was not a final order and hence not appealable. A final order is one that disposes of the controversy. The controversy here as made by respondent's petition was "why an order should not issue requiring her [appellant] to pay the judgment of your petitioner instanter." The order appealed from ordered appellant to pay these costs to respondent on or before five o'clock, and if not so paid, her letters of administration "are hereby revoked, cancelled and set aside." Such an order was the determination of the only controversy before the court and was a final and appealable order.

Judgment reversed.

ELLIS, C. J., MAIN, and CHADWICK, JJ., concur.

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Statement of Case.

[No. 14086. Department One. August 3, 1917.]

*In the Matter of the Estate of JAMES M. HAGERTY.**HELENA GERTRUDE HAGERTY et al., Appellants, v.**LEROY L. WORK et al., Respondents.*<sup>1</sup>

**EXECUTORS AND ADMINISTRATORS—COMPENSATION—VALUE OF ESTATE—COMPUTATION.** The appraised value of the estate is *prima facie* the basis for computing the compensation of executors, in case it is unquestioned, but the actual cash value at the time of final settlement prevails in case of dispute.

**SAME—COMPLAINT—VALUE OF ESTATE—EVIDENCE—SUFFICIENCY.** Where the value of an estate appraised at \$150,000, was largely speculative, and in the final account the executors alleged that the total value as a basis for computing the inheritance tax was \$75,755.79, which sum an executor testified was the amount of property and cash actually received and handled belonging to the estate, the latter sum furnishes the basis upon which the compensation of the executors is to be determined.

**SAME—COMPENSATION—EXTRAORDINARY SERVICE—STATUTES.** Under Rem. Code, § 1549, fixing the compensation of executors at 7 per cent on the first \$1,000, 5 per cent upon the next \$1,000, and 4 per cent on all above that sum, and for any extraordinary services not ordinarily required of executors, a reasonable sum not exceeding the amount of commission allowed, the total amount cannot exceed double the commissions in an ordinary case.

**SAME—COMPENSATION—WHEN PAYABLE—INTEREST.** Executors are not entitled to pay themselves any compensation or commission prior to the time of the final settlement, and if they do so, they are chargeable with interest thereon from the date it is received.

**SAME—COMPENSATION—AS TRUSTEES—ESTOPPEL.** Where executors had at all times proceeded as such, and made their final account and requested the court to allow them compensation as such, they are entitled only to the commissions and compensation for extraordinary services allowed by statute to executors, and it is immaterial whether they acted in a dual capacity of executors and trustees.

Appeal from a judgment of the superior court for Okanogan county, Geo. S. Lee, judge *pro tempore*, entered December 13, 1916, in favor of the defendants, fixing the com-

<sup>1</sup>Reported in 166 Pac. 1139.

pensation of executors of an estate, after a hearing upon objections to the final account thereof. Reversed.

*George F. Hannan and Kronshage, McGovern & Hannan,* for appellants.

*Tolman, King & Way and Smith & Gresham,* for respondents.

MAIN, J.—This is an appeal from a judgment of the superior court fixing the compensation of the executors of the last will and testament of James M. Hagerty, deceased. The appellants are Helena Gertrude Hagerty, Jean Mason Hagerty, and Florence Hagerty, children of the testator, and the residuary beneficiaries named in the will. The respondents are Leroy L. Work, Monroe Harmon, and S. P. Ecki, who were named in the will as executors. The testator having died prior to September 30, 1905, the will was filed for probate on that date. The will, after making certain specific bequests, devised and bequeathed the residue of the estate to the appellants. The will contained a provision that there should be no division of the property for ten years, or until Florence Hagerty, the youngest child, should reach the age of twenty-one years. It also provided that the corporate stock bequeathed to the sisters of the testator should be held in trust for the same period of time by the executors. There was a further provision that it was the desire of the testator that the executors named in the will should pursue, as nearly as possible, the same policy toward the promotion and development of the properties in which the testator was interested which he had pursued during his lifetime, and that such executors might use any money in their hands, from whatever source, to protect the interest of the properties and of the other stockholders, the same as "I have always done." On October 18, 1905, executors Work and Harmon each filed an oath as executor. On November 13, 1905, executor Ecki, who was a resident of Ohio, filed his oath as

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executor. On October 18, 1905, an order was entered by the superior court appointing Work, Harmon, and Ecki executors of the will. This order recited that the will was duly exhibited, proven and recorded. On February 9, 1906, the inventory and appraisement of the estate was filed, which showed the total value thereof to be \$150,701.08. The estate consisted largely of shares of stock in what is referred to as the "Similkameen Falls Power & Development Company," and in various mining enterprises and in a mercantile company.

At the time of the death of the testator, the property sought to be developed by the power company had not been acquired from the Federal government. The executors attempted to acquire title thereto without success, but did obtain a permit from the Federal government to develop the property. On October 8, 1907, the executors filed an account showing receipts and disbursements of the estate from October 9, 1905, to December 10, 1906. On January 15, 1913, the executors filed their second report, which covered the period up to and including December 31, 1912. On October 26, 1916, the executors filed their final account, and recited therein that more than ten years had elapsed since the estate passed into their hands, and that Florence Hagerty, the youngest child, had become twenty-one years of age on the 27th day of September, 1916. To this final account, certain objections were filed by the appellants. Thereafter the cause was heard upon the objections, and a judgment was entered fixing the compensation of the executors at \$10,473, in addition to the interest on the sums that the executors had theretofore paid themselves, and in addition to the sums received by executors Work and Harmon from the Similkameen Falls Power & Development Company while acting as directors of that company. It is from this provision of the judgment that the appeal is prosecuted. Other facts will be recited in connection with the consideration of the particular points to which they may be relevant.

The first question to be determined is the value of the estate, from which the compensation of the executors is to be determined. The appraisement shows that the approximate value of the estate was \$150,000. The inventory shows, as well as the evidence, that the value of the property, from its very nature, was largely speculative. In the final account, the executors alleged that the total value of the estate, as a basis for the computation of the inheritance tax due the state of Washington, was \$75,755.79. While executor Work was testifying upon the hearing, he was asked this question:

"Q. The amount of property and cash actually received and handled by you, which actually belongs to the estate, was approximately \$75,755.79, was it not?"

To this question he replied, "Yes, sir."

We think it is clearly established by this record that the value of the estate at the time of the settlement of the final account was not that shown by the appraisement, but was that recited in the final report and the value testified to by executor Work. It is true that the report recites this is the value as a basis upon which to figure the inheritance tax due the state of Washington, but we see no reason why the estate should have one value for the purpose of determining the inheritance tax and another value for the purpose of fixing the compensation of the executors. While the appraisement may show the *prima facie* value when that is disputed upon the final account, the question becomes one of fact to be determined by evidence. Where the appraised value is greater than the value at the time of the settlement of the final account, the value at the time of settlement prevails as a basis upon which to fix the compensation of the executors. In *Horton v. Barto*, 17 Wash. 675, 50 Pac. 587, it was said:

"In this case the appraised value of the real estate was over \$34,000; while it is contended that the actual value at the time of the settlement was not to exceed \$11,000. The lower court allowed a commission upon the appraised value, holding that the same was arbitrarily fixed by the statutes.

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But it seems to us that the appraisement was not intended to fix anything more than a *prima facie* value, which should stand if unquestioned. This is evidenced by the fact that the other sections of the code referred to provide that the administrator shall account for any excess over the appraised value in case of a sale, and shall not be liable for any loss, where the same occurs without his fault; and our attention has been called to no case deciding that the appraised value is conclusive. But there are many cases holding that the appraisement is only *prima facie* evidence of the value of the estate. [Citing authorities].

"We are of the opinion that the amount of the compensation should be fixed upon the value of the estate at the time of the settlement, the appraised valuation being disputed."

See, also, *In re Smith's Estate*, 18 Wash. 129, 51 Pac. 348.

It follows, therefore, that the sum of \$75,755.79, the value at the time of the settlement in the present case, must furnish the basis by which the compensation of the executors is to be determined.

The next question is the amount of compensation to which the executors are entitled. Section 1549, Rem. Code, provides:

"When no compensation shall have been provided by will, or the executor shall renounce his claim thereto, he shall be allowed commission on the whole estate accounted for by him as follows: For the first one thousand dollars, at the rate of seven per cent; for all above that sum, and not exceeding two thousand dollars, at the rate of five per cent; for all above that sum, at the rate of four per cent; and the same commission shall be allowed to administrators. In all cases such further allowance may be made as the court shall deem just and reasonable for any extraordinary services not required of an executor or administrator in the common course of his duty: Provided, that the total amount of such allowance shall not exceed the amount of commission allowed in this section."

From this statute it will be seen that the executors were entitled, upon the first \$1,000, to a commission of seven per cent; above \$1,000 and not exceeding \$2,000, five per cent; and for all above that sum, four per cent. The last sentence

of the section of the statute quoted provides for an allowance by the court of a just and reasonable sum for extraordinary services which may be performed by an executor or administrator, with the proviso that the total amount of the allowance for such extraordinary services shall not exceed the total amount provided for when no extraordinary services are performed. The first part of the section fixes the compensation in the absence of the performance of any extraordinary services. The second part provides for compensation for extraordinary services and limits that amount to an amount not in excess of the sum allowed when no extraordinary services are performed. By this statute the amount of compensation is fixed when there are no extraordinary services, but when such services are performed the court may allow an additional sum, which additional sum shall not exceed the amount fixed by the statute when no extraordinary services are performed. From this it follows that the respondents, under the first part of the section, would be entitled to the sum of \$3,080.23. Under the second part of the statute, which provides for compensation for extraordinary services, they would be entitled to a like additional sum if such extraordinary services were of that reasonable value. The total amount, therefore, which could be allowed under the statute would be \$6,160.46.

For the present it will be assumed that the respondents performed extraordinary services for which they were entitled to the full amount permitted by the statute.

The next question involves the amount which the executors had already paid themselves and with which they were legally chargeable. On April 19, 1907, the respondents paid executor Work \$500; on June 27, 1913, \$1,500; and on September 27, 1916, \$300; or a total of \$2,300. On April 19, 1907, the respondents paid executor Harmon \$500; on June 27, 1913, \$1,000, making a total of \$1,500. On April 19, 1907, the respondents paid executor Ecki \$500. All these sums were paid without petitioning the court for an allowance, and with-



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out any order of the court making an allowance. Whether the court has the power under any circumstances to award compensation to the executor prior to the settlement of the final account, we do not here determine, as that question is not involved in this appeal. The question here is whether the executors had the right to pay themselves on account of compensation or commission prior to the time of the final settlement. It seems to be well settled that an executor or administrator is not entitled to the commissions allowed him by law until the settlement of his final account. 11 R. C. L. 228; *In re Sullivan's Estate*, 36 Wash. 217, 78 Pac. 945; *In re Hite's Estate*, 155 Cal. 448, 101 Pac. 448. In the case last cited, it is said:

"It is settled that an executor or administrator is not entitled to the commissions allowed him by law until the settlement of his final account."

If the executor is not entitled to the commissions allowed him by law until the settlement of his final account, the question then arises whether, if he pays himself such commissions prior to that time, he should be charged with interest upon the sums so paid. Upon this question, also, the law is well settled. The rule is that, where an executor pays himself commissions prior to the final settlement of his account, he is charged with interest upon such commissions from the date that he received them. *Wheelwright v. Rhoades*, 28 Hun (N. Y.) 57; *In re Furniss*, 86 App. Div. 96, 83 N. Y. Supp. 530; *In re Stratton*, 76 Misc. Rep. 584, 137 N. Y. Supp. 311; *Kenan v. Graham*, 135 Ala. 585, 33 South. 699; *Wyckoff v. O'Neil*, 71 N. J. Eq. 729, 71 Atl. 388; *In re Carter's Estate*, 132 Cal. 113, 64 Pac. 123, 484.

In the case last cited, it is said:

"The executor was properly charged with interest upon the sum he appropriated as his commissions. He was not entitled to his commissions until the settlement of his final account. (*In re Rose*, 80 Cal. 180.) This money belonging to the estate was appropriated by him to his own use, and

under these circumstances he was properly charged with interest upon the amount."

It therefore follows that the respondents here should be charged with interest upon the sums which they respectively paid to themselves. This interest, at the legal rate, would amount to approximately \$1,375. In addition to this, executor Work received the sum of \$230 for attending twenty-three directors' meetings of the power company, which sum he admitted should be charged to him as commissions. From the same source, executor Harmon had received \$410, which he likewise admitted should be charged to him as commissions.

Taking now the \$4,300 which the respondents had paid to themselves as executors, the \$1,375 with which they were chargeable for interest, and the \$230 and the \$410 which executors Work and Harmon had respectively received as trustees, we have a total of \$6,315, which the respondents, at the time of the hearing, had either received as commissions or with which they were chargeable as such. As above pointed out, the total amount which the respondents were entitled to as executors, including extraordinary services, would be \$6,160.46. The amount which they received and with which they are chargeable exceeds this sum by \$154.54. It therefore appears that the judgment of the trial court, instead of allowing the respondents additional compensation, should have charged them with the excess of that which they had received. The appellants are not asking for any affirmative relief, and it was said upon the oral argument that they did not seek an affirmative judgment against the respondents. For this reason, no such judgment will be directed.

Some discussion is found in the briefs relative to whether the respondents acted solely as executors, or executors with trust powers, or in the dual capacity of executors and trustees, but it does not seem to us that it is necessary to determine this question. They at all times had proceeded as executors and made their final account, from which this appeal is prosecuted as such, and requested the court to allow them

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compensation as such. It would seem that the statute providing for compensation for extraordinary services was intended to meet such a case as this. The executors had received the greatest amount which they would be allowed by the statute, and more.

The case of *Pitney v. Everson*, 42 N. J. Eq. 361, 7 Atl. 860, is not in point for the reason that, in that case, the executor had rendered his final account and had been allowed his commissions. Thereafter he acted as trustee and sought additional compensation in that capacity, which was awarded him. The distinction between that case and this lies in the fact that everything done by the respondents up to the time of the rendering of their final account, in the case now before us, was done as executors. At no time had they rendered a final account in such capacity and continued thereafter in the capacity of trustees.

Finally, it is contended that, under the new probate code, ch. 156, Laws of 1917, p. 687, § 158, the executors were entitled to such compensation as the court might deem just and reasonable, based upon the services rendered, and that the executors in this case in fact earned the amount of compensation fixed by the trial court. Whether that act has a retroactive effect sufficient to include the present case we do not determine.

After a careful consideration of the record, without reviewing the testimony here in detail, we are of the opinion that the services rendered by the executors to the estate were not reasonably worth more than what could be allowed under Rem. Code, § 1549, *supra*.

The judgment will be reversed, and the cause remanded, with direction to the superior court to enter a judgment denying the respondents any further compensation than that which they had already received prior to the hearing upon the final account.

Reversed and remanded.

ELLIS, C. J., CHADWICK, MORRIS, and MOUNT, JJ., concur.

[No. 14096. Department Two. August 3, 1917.]

**F. M. Tufts *et al.*, Appellants, v. R. A. Riffe *et al.*,  
Respondents.<sup>1</sup>**

**SCHOOLS AND SCHOOL DISTRICTS—BOUNDARIES—DECISION—REVIEW—ACTION TO SET ASIDE—STATUTES.** An action in equity to set aside an order of the board of county commissioners affirming a decision of the superintendent of schools refusing to transfer lands from one school district to another does not lie, and is insufficient as an application for a writ of certiorari to review the same, where it seeks a trial *de novo* and does not bring up the record; in view of Rem. Code, § 4706, providing for appeals from orders of county superintendents relating to boundaries or the adjustment of assets and liabilities to the board of county commissioners, and for appeals to the courts only in "matters involving the construction of contracts," and § 4711, which provides that, on appeals to the board of county commissioners, its decision "shall be final unless set aside by a court of competent jurisdiction in an action brought therein to review such order or decision," which refers to certiorari to review the order on the record, and not by trial *de novo*.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered October 24, 1916, upon sustaining a demurrer to the complaint, dismissing an action to set aside an order of the board of county commissioners upon appeal from a decision of the superintendent of schools. Affirmed.

*John L. Dirks*, for appellants.

*J. D. McCallum*, for respondents.

ELLIS, C. J.—In this action plaintiffs seek to set aside an order of the board of county commissioners of Lincoln county affirming a decision of the superintendent of schools of that county denying a petition to transfer certain lands of plaintiff F. M. Tufts from school district No. 118 to school district No. 98, both districts being located in Lincoln county. The other plaintiffs, J. R. Wyborny, James P. Tufts and E. E. Johnson, are the directors of district No. 98.

<sup>1</sup>Reported in 166 Pac. 788.

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In the complaint it is alleged, in substance, that, on October 27, 1914, plaintiffs filed with the superintendent of schools for Lincoln county their petition for the desired transfer, which petition was denied; that they thereupon appealed from the decision of the superintendent to the board of county commissioners, which board sustained the order of the superintendent denying the petition; that, on the hearing before that board, witnesses were examined and evidence introduced in support of the petition; that the grounds of the petition were excessive distance and inaccessibility of the schoolhouse in district No. 118 from the lands in question. The prayer is that the decision of the board of commissioners and of the school superintendent be reversed, set aside, and held for naught, that the prayer of the petition be granted, and that the board of commissioners and school superintendent be directed to make the desired transfer, and for general relief.

Defendants demurred to the complaint on the ground, among others, that the superior court has no jurisdiction of the subject-matter of the action. The demurrer was sustained. Plaintiffs declining to plead further, the action was dismissed. They appeal.

Appeals from and reviews of decisions or orders of school officers, school boards, and boards of county commissioners touching school matters are governed by the act of 1909, embodied in Title 28, chapter 35 of Rem. Code. We shall refer to the code sections.

Section 4706 provides that an appeal may be taken by any person or persons aggrieved thereby from any decision or order of any school officer or school board, within thirty days after such decision, "to the proper officer or board as hereinafter provided."

Section 4707 is as follows:

"Appeals from the decision or order, or from the failure to decide or order, by a board of school directors shall be taken to the county superintendent of schools in and for the county. Appeals from the decision or order, or the failure to decide

or order, of a county superintendent of schools shall, when relating to the territory or boundaries, or to the adjustment of the assets or liability of school districts, be taken to the board of county commissioners wherein the territory lies, but when relating to the operation or management of schools, or the property of the school district or to the relations with teachers such appeal shall be taken to the superintendent of public instruction: Provided, that in matters involving the construction of contracts the appeal shall be taken to the court of the proper resort."

Section 4708 provides that the basis of appeal shall be an affidavit or affidavits of the party aggrieved.

Section 4709 provides for the filing, within twenty days after notice, of a complete certified transcript "of the record and papers and proceedings relating to the decision complained of," with the officer or board to whom the appeal is taken.

Section 4710 prescribes the mode and scope of the hearing of the appeal by the county superintendent, board of county commissioners, or superintendent of public instruction, as the case may be, and accords a hearing *de novo* by the board of county commissioners only.

Section 4711 declares:

"In decisions of appeal by the superintendent of public instruction and by the board of county commissioners the decision or order shall be final unless set aside by a court of competent jurisdiction in an action brought therein to review such order or decision."

Appellants cite the section last above quoted as authority for the procedure by independent action seeking a trial *de novo* in the superior court. They have mistaken their remedy. The governing statute gives no appeal to the courts except "in matters involving the construction of contracts." See proviso, § 4707, above quoted. Section 4711 does not provide for an appeal nor for a hearing *de novo*, but only for a review by the court in an action brought for that purpose. Obviously the proceeding contemplated by this section is by

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certiorari to review the decision or order complained of on the record made before the county superintendent and board of county commissioners, which is a very different thing from a trial *de novo*, such as appellants seek in the complaint before us. This complaint does not purport to be, and is in any event wholly insufficient to operate as, an application for a writ of review. It does not bring up, nor seek to have certified to the superior court, the record made nor the evidence taken on the hearing before the board of county commissioners, though the fact that witnesses were examined and evidence taken on that hearing is affirmatively alleged. The complaint can only be construed as a bill in equity seeking the relief asked for in the petition through a trial *de novo*. No such jurisdiction is conferred by the statute. The demurrer was properly sustained.

The cases of *Wilsey v. Cornwall*, 40 Wash. 250, 82 Pac. 303, and *State ex rel. School District etc. v. Board of County Com'rs*, 72 Wash. 454, 130 Pac. 749, cited by appellants, so far as they have any bearing on the question here involved, sustain the view here expressed.

The judgment is affirmed.

FULLERTON, MOUNT, PARKER, and HOLCOMB, JJ., concur.

[No. 13876. Department Two. August 4, 1917.]

JAHN & COMPANY *et al.*, *Appellants*, v. MORTGAGE TRUST &  
SAVINGS BANK *et al.*, *Respondents*.<sup>1</sup>

CONTRACTS—BUILDING CONTRACTS—PERFORMANCE OR BREACH—FINAL PAYMENT—OUTSTANDING BILLS. Under a contract for the construction of a building for the sum of \$47,000, \$35,000 of which was raised by a first mortgage and used in the payment of bills in the progress of the work, the contract providing that the balance shall be paid by a second mortgage to the contractor upon the completion of the building, the owner is not bound to execute the second mortgage while bills and claims for liens against the building were outstanding, which the contractor refused to satisfy as his duty under the contract required.

SAME. The fact that the owner of the building took a surety bond guaranteeing the faithful completion of the work, was merely an additional protection, and did not require the owner to rely wholly upon the bond and make final payment before the contractor had paid bills and claims for liens.

MORTGAGES—PRIORITY—MECHANICS' LIENS. Where the contractor, at the time of entering into the contract, knew that a mortgage was to be given as a prior lien to raise money to pay for the work, the mortgage is prior to the claims of the contractor, although work was commenced before the mortgage was executed and filed, notwithstanding Rem. Code, § 1132, providing that a mechanics' lien is preferred to any incumbrance attaching subsequent to the commencement of the work.

SAME. Under Rem. Code, § 1132, providing that a mechanics' lien is preferred to any incumbrance attaching subsequent to the commencement of the work for which the lien is given, a mortgage given to raise money to pay bills and expenses incurred in the progress of the work, but filed subsequent to the commencement of work on the building, is superior to claims for materials furnished to the contractor long after the mortgage was made and recorded.

Appeal from a judgment of the superior court for King county, Edward H. Wright, J., entered September 18, 1916, upon findings in favor of certain defendants, in an action to foreclose mechanics' liens, tried to the court. Affirmed.

<sup>1</sup>Reported in 166 Pac. 1137.



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*Chester A. Batchelor, E. W. Bundy, Wilmon Tucker, Beechler & Batchelor, Tucker & Hyland, Alexander & Bundy, John W. Roberts, C. Dell Floyd, Hughes, McMicken, Dovell & Ramsey, W. H. White, Herr, Bayley & Wilson, Frank A. Paul, Spence & Denham, Bogle, Graves, Merritt & Bogle, and Vanderveer & Cummings, for appellants.*

*Wright, Kelleher & Allen, for respondent Mortgage Trust & Savings Bank.*

MOUNT, J.—This action was brought to foreclose certain liens for materials furnished in the construction of a building. Upon issues joined, the case was tried to the court without a jury, and resulted in findings and a judgment that the liens for materials furnished were inferior to a mortgage lien of the Mortgage Trust & Savings Bank; that the Coast Construction Company, the contractor for the building, was entitled to a mortgage for the sum of \$4,991.85, together with costs and interest; and that, if the defendant E. E. Simpson Company failed to execute said mortgage, a commission be appointed for that purpose. The liens for the materialmen were held to be prior to the claim of the Coast Construction Company. The lien claimants and the Coast Construction Company have appealed from that judgment.

The record in the case is lengthy and the facts are somewhat involved, but we think the substance of the material facts may be simply stated as follows: In January of 1915, E. E. Simpson Company was the owner of a lot in the city of Seattle. Sheppard Van & Storage Company had agreed to lease these premises when a certain building was constructed thereon. The Sheppard company and the Simpson company had agreed upon plans for such building. The Coast Construction Company entered into a contract with the Simpson company to construct the building. At the time this contract was entered into, it was understood by the Sheppard Company and by the Coast Construction Company that the sum of \$38,500 was to be borrowed and a first mortgage

placed upon the property to pay for the construction of the building. Thereupon, on the 28th day of January, 1915, the Simpson company and the Coast Construction Company entered into a contract as follows:

"That Whereas, first party is the owner of lot eleven (11) in block H of A. A. Denny's Fourth addition to the city of Seattle in King county, state of Washington, and desires to erect a seven story reinforced concrete building class A flat slab type upon said premises.

"Now Therefore, second party is to furnish all the necessary plans and specifications for said building and excavations therefor to be prepared by H. Bittman, and cause said plans and specifications to be approved by the building department of the city of Seattle, said plans to conform to the verbal understanding heretofore agreed upon, and are to furnish all materials and labor and other expenses incurred in connection with the erection of said building and in excavations and preparations therefor, and to erect upon said premises a building in accordance with said plans and specifications, all complete for the sum of \$47,000, of which \$35,000 shall be used in the payment of bills against said building as same may be required in the progress of construction. It being understood that there shall be made available for such payments at the beginning of the first thirty days from date of this contract \$5,000, and at the beginning of each thirty days thereafter the sum of \$10,000, and upon the completion of said building. The balance of said contract price, to wit, the sum of \$12,000, to be paid by first party executing and delivering to second party a second mortgage upon said premises in the said sum securing four notes as follows, \$2,000 on or before one year from date thereof, \$3,000 on or before two years from date thereof, \$3,000 on or before three years from date thereof, and \$4,000 on or before four years from date thereof, with interest at 7% per annum payable annually."

The contract then proceeds to describe certain details of the work to be done. It then provides:

"Second party is to furnish a good and sufficient surety bond executed by a surety company of good standing and repute in the sum of \$20,000, guaranteeing the completion

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of said building and the payment of all bills incurred in the construction and completion thereof.

“Second party is to push the construction of said building as rapidly as possible consistent with good workmanship, and agrees to complete the same on or before the first day of June, 1915, and is to furnish first party with satisfactory evidence of the payment of all bills or expenses incurred in the construction and completion of said building or in connection therewith or the excavations and preparations therefor.”

This contract was signed by E. E. Simpson Company, the owner of the lot, and by the Coast Construction Company, the contractor. Thereafter, the Coast Construction Company executed and delivered to the Simpson Company its bond, with the Maryland Casualty Company as surety, in the sum of \$20,000, conditioned for the faithful performance of the contract. Thereafter, on the next day, January 28, 1915, the Coast Construction Company entered upon the work of constructing the building. On February 5, 1915, the defendant E. E. Simpson Company executed and delivered to the Mortgage Trust & Savings Bank its notes for \$38,500, secured by a mortgage upon the lot above described. This mortgage was duly recorded on the same day. Work progressed upon the building until the 20th day of July, 1915, when the building was completed and possession taken by the Simpson company and the Sheppard company. During the course of the construction of the building, liens were filed for material and labor furnished to the contractor by the lien claimants. The amount of all these claims was, in round figures, \$9,500. These claims were not paid by the Coast Construction Company. During the course of the work, the Coast Construction Company, at the instance of the Simpson company, furnished extra labor and material which the court found to be of the reasonable value of \$3,190.65. It is conceded that the \$35,000 provided for in the contract to be paid during the progress of the work was paid as agreed upon. After the work was finished, the Simp-

son company, the owner of the building, refused to execute the second mortgage for \$12,000 until the lien claimants had been paid. The Coast Construction Company then filed a lien for \$12,000, which it claimed was due under the contract, and for \$3,297.75 for extra work done.

The principal claim of the appellants is that the materialmen who have liens, and the contractor, who claims a lien, are all prior to the mortgage executed in favor of the Mortgage Trust & Savings Bank on February 5, 1915, and that they are entitled to foreclose these liens ahead of that mortgage.

If it is not conceded, we think it is proved beyond question that, at the time the contract for the construction of the building was entered into between the Simpson Company and the Coast Construction Company, it was understood by both parties to the contract that the Simpson Company was to borrow the money with which to construct the building. The arrangements for the money and for a mortgage to secure the same had already been made, and the Coast Construction Company was aware of that fact. The contract provided that \$35,000 of the contract price should be used in the payment of bills against the "building as same may be required in the progress of construction." It is conceded that this money was so paid. The mortgage was executed on the 5th day of February, about a week after the contract was entered into. The contract provided that the balance of the \$47,000, after the \$35,000 was paid, namely, \$12,000, was to be paid by a second mortgage for that amount. After the building was completed, materials which were furnished to the contractor, amounting to something like \$9,500, had not been paid for, and liens had been filed against the building. The Simpson company refused to execute the mortgage until these lien claims were paid by the contractor. We think it is plain that the Simpson company was not required by the terms of the contract to execute the mortgage for \$12,000 until those lien claims were satisfied, because the contract provided that it was the duty of the Coast Construction Com-

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pany to furnish to the Simpson company satisfactory evidence of the payment of all bills and expenses incurred in the construction and completion of the building or in connection therewith.

It is argued by the appellant that, because the Simpson company took a surety bond for the faithful completion of the work, it was bound to execute the mortgage and look to the surety company to pay the lien claims. This surety bond was taken for the protection of the Simpson Company. It was an added provision to the conditions contained in the contract. The Simpson company might choose whether it would require the payment of all claims by the contractor before executing and delivering the mortgage for the final payment of \$12,000, or pay the lien claims itself and resort to the bond for protection. It was not incumbent upon the Simpson company, therefore, to rely wholly upon the bond.

We have no doubt that the mortgage of the Mortgage Trust & Savings Bank is prior to the claim of the Coast Construction Company, because the Coast Construction Company, at the time it entered into the contract, knew that mortgage was to be given and was to be a prior lien upon the premises. Section 1132, Rem. Code, provides, in substance, that mortgage liens filed or recorded prior to the performance of labor or the furnishing of materials are prior liens. In Bloom on Mechanics' Liens and Building Contracts, at § 499, on page 460, it is said:

"But where the claimant enters into a contract with the owner, and a third party takes a mortgage upon the property, and parts with value, relying upon the terms of that contract, the claimant and owner cannot change the terms of the contract to the detriment of the mortgagee, and the lien, so far as it is extended by the change of the agreement, will not take priority over the mortgage; . . ."

In *Cutler v. Keller*, 88 Wash. 334, 153 Pac. 15, in referring to Rem. & Bal. Code, § 1132, we said, at page 339:

"The language of this section carries the necessary implication that the lien accorded to mechanics and materialmen

is subject to the lien of a prior mortgage on the real estate recorded prior to the commencement of the performance of the labor or the furnishing of the material, or of which the lien claimant had notice. We have uniformly so construed it." [Citing a number of authorities.]

In *Olsen v. Smith*, 84 Wash. 228, 146 Pac. 572, we said:

"Section 1132 expressly declares the mechanics' lien a preferred lien to any incumbrance attaching subsequent to the commencement of the work for which the lien is given, and also to any incumbrance which may have attached previously to the time and was not filed for record until after that time, of which the lien claimant has no notice."

See, also, *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147, and *Heal v. Evans Creek Coal & Coke Co.*, 71 Wash. 225, 128 Pac. 211.

Since the Coast Construction Company had actual notice of this mortgage it was bound by it, and cannot now claim that its lien for extras and for the balance due upon the contract is prior to that mortgage.

The materials furnished to the Coast Construction Company by other lien claimants were furnished long after the mortgage was made and was of record. They are, therefore, clearly subject to the mortgage of the Mortgage Trust & Savings Bank, and were required to take notice of that mortgage, if they did not have actual notice. We are satisfied, therefore, that the mortgage for \$38,500, being prior in time, is a prior lien to both classes of lien claimants.

The trial court found that there was a balance due of \$12,000 to the Coast Construction Company by the terms of the contract, and something over \$3,000 for extras furnished, making a total of \$15,190.65 due to the contractor. The court further found that there was due from the contractor to the materialmen the sum of \$9,503.74, together with \$695, being two-thirds of the cost of foreclosing the liens. It was adjudged that the liens should be foreclosed against the property subject to the \$38,500 mortgage; that the amount of these materialmen's claims should be deducted from the fifteen

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thousand and odd dollars due the contractor; and that a mortgage for the balance should be executed by the Simpson company in favor of the Coast Construction Company. While there is some argument in the briefs that these findings were incorrect, we think the evidence fully supports the findings, and that the judgment of the trial court was just and equitable in this respect.

Some assignments of error relating to the pleadings are argued in the briefs. We do not notice these assignments because the question of priorities decided above is the controlling question in the case and effectively disposes of the merits of the controversy.

We are satisfied, upon the record, that the judgment was right and just. It is therefore affirmed.

ELLIS, C. J., PARKER, FULLERTON, and HOLCOMB, JJ., concur.

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[No. 13909. Department Two. August 4, 1917.]

F. W. BARKER, *Respondent*, v. THE CITY OF SEATTLE,  
*Appellant*.<sup>1</sup>

JUDGMENT—VACATION—JURISDICTION. The superior court has jurisdiction of the subject-matter of the vacation of judgments, and final orders therein are as conclusive as other judgments.

EMINENT DOMAIN — JUDGMENT AWARDING DAMAGES — VACATION. Rem. Code, § 7783, providing that judgments in eminent domain shall be final and conclusive as to the damages unless appealed from, was not intended to control the power of the superior courts to vacate and set aside such judgments as provided in the general statutes, Rem. Code, § 464; in view of Const., art. 1, § 16, providing that compensation in eminent domain shall be ascertained "as in other civil cases."

SAME. The fact that the judgment in eminent domain proceedings has been satisfied does not affect the jurisdiction of the court to vacate it, as against the judgment creditor duly served with process.

<sup>1</sup>Reported in 166 Pac. 1143.

**SAME—JUDGMENT—AWARDING DAMAGES—VACATION—SATISFACTION BY WARRANTS—RIGHTS OF ASSIGNEE—NOTICE.** The vacation of a judgment for damages in eminent domain proceedings, for which a city warrant had been issued in satisfaction of the judgment, is binding and conclusive upon an assignee of the warrant, where the city had no notice of the assignment, and proceeded against the judgment creditor as the apparent party in interest; since such warrants are not negotiable instruments precluding settlement with the judgment creditor apparently holding the judgment, especially where no local assessment fund had been provided for the payment of the warrant.

**MUNICIPAL CORPORATIONS—ASSESSMENTS—WARRANTS—LIABILITY—FAILURE TO PROVIDE FUND.** The failure of a city to provide a local assessment fund for the payment of a warrant given in satisfaction of a judgment for damages payable out of the fund, does not make the warrant a general fund warrant.

Appeal from a judgment of the superior court for King county, Frater, J., entered September 18, 1916, upon findings in favor of the plaintiff, in an action for damages, tried to the court. Reversed.

*Hugh M. Caldwell and James A. Dougan*, for appellant.

*Kerr & McCord*, for respondent.

**PARKER, J.**—The plaintiff, F. W. Barker, seeks recovery of damages from the defendant, city of Seattle, because of its failure to provide a local improvement fund by special assessment to pay compensation awarded in eminent domain proceedings for the taking of land for the extension of Phinney avenue in that city. Warrants were issued against the contemplated local assessment fund for the amount of the award, one of such warrants being now held by the plaintiff as assignee of Olof Nelson, to whom the award was made and the warrants issued. Trial in the superior court for King county resulted in findings and judgment against the city, awarding to the plaintiff damages in the sum of \$1,689, the amount of the warrant held by him, together with interest thereon from January 10, 1911, the date of the issuance of the warrant. From this disposition of the cause, the city has appealed to this court.



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In August, 1909, there was passed and approved by the city council and mayor of the city of Seattle an ordinance providing for the acquisition, by eminent domain proceedings, of a strip of land eighty feet wide for the extension of Phinney avenue in that city. The ordinance also provided that the land so acquired should be paid for by special assessment upon the property benefited by such extension, and that any part of the cost of such extension not finally assessed against the property specially benefited should be paid from the general funds of the city. Eminent domain proceedings were accordingly instituted in the superior court for King county, resulting in a verdict and judgment rendered thereon in January, 1911, awarding to Olof Nelson, as the owner of the land to be taken, the sum of \$5,898. Neither the city nor Nelson appealed from that judgment, but both being then satisfied therewith, the city issued to Nelson, against the prospective special assessment fund, four warrants aggregating the total amount of the judgment and costs, one of which warrants was the \$1,689 warrant here in question. In the body of this warrant, after the direction of payment from the special assessment fund, appears the following: "This warrant is not a general debt of the city of Seattle and is payable only out of the proceeds of the collections of the special assessment made for the condemnation for which it is issued." Upon receiving these warrants, Nelson satisfied the judgment upon the records of the superior court. Thereafter, by mesne assignments and by bequest, respondent became the holder of the \$1,689 warrant and, as such, succeeded to all of the rights of Nelson.

In December, 1911, the city filed its petition in the superior court for King county seeking vacation and annulment of the verdict and judgment awarding compensation to Nelson as owner of the land. Nelson was duly notified and appeared generally in the vacation proceeding, and the question of the vacation of the verdict and judgment being presented to

and submitted to the superior court upon the merits, that court, on April 20, 1912, entered its order vacating and setting aside the verdict and judgment awarding to Nelson compensation for which the warrants against the prospective local assessment fund were issued. This order of vacation has never been appealed from, vacated or set aside. While the warrant here in question was assigned by Nelson before the vacation of the eminent domain judgment, no one was made a party defendant in the vacation proceeding other than Nelson, the judgment creditor; so none of Nelson's successors in interest, including respondent, ever had an opportunity to resist the city's application to vacate the judgment. Nor did any of Nelson's successors in interest learn of the city's application to vacate that judgment or of the order vacating it until long after the order of vacation was entered. The record before us compels us to proceed upon the assumption that, at the time the city applied to vacate the judgment and at the time of the entering of the order of vacation, the city had no notice that Nelson had, prior thereto, assigned the warrant here in question.

The ground of the city's application for vacation of the judgment in the eminent domain proceeding appears to be that it was discovered, after the rendering of that judgment, that Nelson was not in fact the owner of the whole of the eighty-foot strip of land sought to be condemned, but was the owner of only a twenty-foot strip along the east side thereof. This, however, as we proceed, we think, will appear to be of no moment so far as our present inquiry is concerned, since it would have to do only with questions of error in the entering of the order of vacation, which order, as we have noticed, has never been appealed from or set aside. There has never been any special assessment made and confirmed looking to the creation of a fund to pay the warrants issued to Nelson following the rendering of the judgment awarding him compensation in the eminent domain proceeding. In January, 1912, the city council and mayor of the city

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passed and approved an ordinance purporting to amend the original ordinance providing for the acquisition of the eighty-foot strip of land for the extension of Phinney avenue, in effect repealing the provisions of that ordinance in so far as it contemplated acquisition of the entire eighty-foot strip, and providing for the acquisition by eminent domain proceedings of a twenty-foot strip of land along the east side of the eighty-foot strip for use as a part of Phinney avenue.

If this action were being prosecuted by Nelson, to whom the warrants were originally issued, it would seem plain that he could not recover because of the order vacating and setting aside the judgment awarding him compensation for which the warrants were issued. It may be that error was committed by the superior court in vacating that judgment such as would call for the reversal of the order of vacation upon appeal; but we have seen that Nelson was a party to the vacation proceeding; that he received due notice and appeared generally therein; that the issues in that proceeding were disposed of upon the merits, resulting in a final order vacating the eminent domain judgment; and that the order of vacation has not been appealed from or set aside, but remains in full force and effect in so far as the rights of Nelson are concerned. That superior courts have jurisdiction of the subject-matter of the vacation of final judgments and that their final orders rendered in vacation proceedings are as conclusive as other judgments, is thoroughly settled by our decisions. *Chezum v. Claypool*, 22 Wash. 498, 61 Pac. 157, 79 Am. St. 955; *Wilson v. Seattle Dry Dock & Ship Bldg. Co.*, 26 Wash. 297, 66 Pac. 384; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757; *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 104 Pac. 159, 133 Am. St. 1005; *Flueck v. Pedigo*, 55 Wash. 646, 104 Pac. 1119; *Newell v. Young*, 59 Wash. 286, 109 Pac. 801; *Kelley v. Sakai*, 72 Wash. 364, 130 Pac. 503.

Contention is made in respondent's behalf that, because the judgment awarding Nelson compensation was rendered in an eminent domain proceeding, it was not within the power

of the superior court to vacate it; that, in doing so, that court acted without the jurisdiction of the subject-matter, and that therefore its order of vacation is void and not conclusive upon any one. Counsel argue that our general statute relating to the vacation of judgments, Rem. Code, § 464 *et seq.*, has no application to the vacation of judgments in eminent domain proceedings, and that our eminent domain statute negatives the idea that judgments rendered in such proceedings may be vacated for any cause except by appeal. This argument seems to be rested upon the fact that our eminent domain statute does not, in terms, provide for the vacation of a judgment of award rendered in proceedings had thereunder, and also upon that portion of Rem. Code, § 7783, reading as follows: "Such judgment or judgments shall be final and conclusive as to the damages caused by such improvement unless appealed from . . ." We do not view this language as an attempt on the part of the legislature to curtail the power of our superior courts to vacate and set aside judgments rendered in eminent domain proceedings. Being courts of general common law and equity jurisdiction, and § 16, art. 1 of our constitution providing, in substance, that the exercise of the power of eminent domain shall be by judicial proceedings and that compensation shall be ascertained therein "as in other civil cases," it seems plain to us that the inherent power of the superior courts to vacate such judgments upon proper showing remains undisturbed. We do not think that this statutory declaration as to the finality of the judgments in eminent domain proceedings makes such judgments conclusive in any other sense than a final judgment becomes conclusive in any other proceeding. Our general statute relating to the vacation of judgments in civil actions, while in terms purporting to confer the power of vacation upon superior courts, is in effect only a statute of procedure. The power is inherent in courts of general jurisdiction, such as our superior courts, in the absence of statute. 15 R. C. L. 688; 28 Cyc. 890.

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Some contention is made that the superior court had no power to vacate the eminent domain judgment because it was satisfied upon the superior court records. As a question of error in entering the vacation order, this suggests a problem of interest as to which there seems to be some conflict in the decisions. 23 Cyc. 898. It seems plain to us, however, that it does not have any controlling force upon the question of the jurisdiction of the superior court over the subject-matter of vacating the eminent domain judgment as exercised in the vacation proceeding here in question. We conclude that the order of vacation is not void for want of jurisdiction over the subject-matter, and not being void for want of due process as against Nelson, it follows as a matter of course that it is conclusive as to him, and, at all events, would have prevented recovery in this action were he the plaintiff herein.

Does the order of vacation have a like effect upon the rights of respondent in this action? We feel constrained to hold that it does. It has become the settled law of this state, in harmony with the rule elsewhere, that municipal and state warrants are not negotiable instruments, and that, when in the hands of assignees of persons to whom they were issued, they evidence no more binding obligation upon the municipality or state issuing them than when in the hands of the persons to whom issued. In other words, they are simply assignable as nonnegotiable choses in action. *Bardsley v. Sternberg*, 17 Wash. 248, 49 Pac. 499; *West Philadelphia Title & Trust Co. v. Olympia*, 19 Wash. 150, 52 Pac. 1015; *State ex rel. Olympia Nat. Bank v. Lewis*, 62 Wash. 266, 113 Pac. 629; *University State Bank v. Bremerton*, 86 Wash. 261, 150 Pac. 429; 1 Daniel, Negotiable Instruments (6th ed.), § 427; 28 Cyc. 1570.

Counsel for respondent argue, however, that, because respondent was not made a party to the vacation proceeding, and he being a holder of the warrant in question at the time of the institution of that proceeding and the entering of the order therein vacating the eminent domain judgment, that

order is not conclusive upon him. We have seen that the city had no notice of any one other than Nelson having any right, by assignment or otherwise, in the award of compensation made in the eminent domain judgment until after the entry of the order vacating that judgment. In other words, in prosecuting the vacation proceeding, the city gave notice to, and made defendant in that proceeding, the only person, to wit, Nelson, whom it had any knowledge of then having any interest in the eminent domain judgment and the warrants issued thereon. Now, because of this want of notice on the part of the city, and the fact that the city's obligation to pay the eminent domain judgment was not evidenced by negotiable instruments, the rule that the debtor may, without notice of assignment of such a debt by his creditor, safely settle such debt with his creditor and render himself free from all obligation to his creditor's assignees, seems of controlling force here. 5 C. J. 960; 2 R. C. L. 622.

This principle was recognized and applied in our decision in *Dial v. Inland Logging Co.*, 52 Wash. 81, 100 Pac. 157. Counsel for respondent cite and rely upon our decision in *State ex rel. Reed v. Gormley*, 40 Wash. 601, 82 Pac. 929, 3 L. R. A. (N. S.) 256, holding in substance that, in an action to enjoin the payment of general current expense fund county warrants issued by order of the county commissioners of King county for services rendered to the county, there was a defect of parties defendant in failing to make assignees of the original holder of the warrants parties to the case, the county having knowledge that the original holder had sold and assigned the warrants to third persons. The warrants there in question became contracts for the payment of money as a general indebtedness of the county, as was in effect held in *Union Savings Bank & Trust Co. v. Gelbach*, 8 Wash. 497, 36 Pac. 467, 24 L. R. A. 359. The warrant here in question does not purport to evidence a general indebtedness of the city. Indeed, by its very terms, as we have noticed, it expressly declares otherwise. Nor would the fact that the city

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failed to provide a local assessment fund to pay the warrant, or the fact that the city might have provided such a fund and wrongfully diverted it, make the warrant a general fund warrant. This is not an action to recover from the city upon the warrant. Indeed, no such action could be maintained. But it is an action to recover damages for the alleged wrong of the city in failing to provide a local assessment fund to pay the warrant. *Quaker City Nat. Bank v. Tacoma*, 27 Wash. 259, 67 Pac. 710; *Jurey v. Seattle*, 50 Wash. 272, 97 Pac. 107. Now, since the award made to Nelson by the eminent domain judgment constituted an obligation which the city could have settled or compromised with Nelson in any manner mutually satisfactory to him and the city, thereby freeing the city from all liability to his assignees, who had acquired interests therein by assignment without notice to the city, it seems to us that the city could render itself equally free from all claims of Nelson's assignees against it of whom it had no notice, by this vacation proceeding instituted and prosecuted against Nelson in the superior court, resulting in a final order vacating the judgment upon which the warrant was issued. This manifestly was as conclusive a settlement and abrogation of the rights of Nelson and his assignees as a mutual voluntary settlement between Nelson and the city would have been.

We have not lost sight of the fact that the warrant in question constitutes such a chose in action as may be transferred by mere indorsement and delivery, and it may be that the city could not safely pay to Nelson from the special assessment fund, if one had been created, the amount called for by the warrant without surrender of the warrant. Probably the well known custom of dealing in such contracts for the payment of money is sufficient to make the surrender of such warrants upon their payment necessary in order to render the city free from liability in some form of action to an assignee. There is not here involved the payment of the warrant to the wrong person, but simply the question of the con-

clusiveness of the order vacating the eminent domain judgment as against Nelson's assignees, of whom the city had no notice until after the entry of the order of vacation. We feel constrained to hold that assignees of such warrants take them with notice of the possibility of the judgment upon which they are issued being vacated, at least upon application filed within the year prescribed by our statute relating to the vacation of judgments, as the application for vacation here involved was filed, and that assignees of whom the city has no notice will be bound by an order of vacation in a proceeding to which the judgment creditor is a party.

To what extent respondent may be entitled to relief as against the special assessment fund which may be hereafter created to pay the award which presumably will be made to Nelson in another eminent domain proceeding looking to the acquisition of the twenty-foot strip of land for use as a part of Phinney avenue, we do not here decide. We hold only that the city cannot be compelled to respond in damages in this action.

We conclude that the judgment of the trial court must be reversed and the action dismissed. It is so ordered.

ELLIS, C. J., MOUNT, and FULLERTON, JJ., concur.



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Statement of Case.

[No. 13914. Department Two. August 4, 1917.]

R. A. RICHARDSON, *Respondent*, v. THE CITY OF SEATTLE,  
*Appellant*.<sup>1</sup>

**MUNICIPAL CORPORATIONS—STREETS—DEFECTS—DUTY TO REPAIR.** A city is bound to keep in repair a reasonable way along an ungraded street that has, to the knowledge of the city, been in constant use by the public for more than ten years and which it has recognized as a public street.

**SAME—STREETS—DEFECTS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.** The driver of a one horse wagon coming down a steep grade, who was thrown to the ground when a wheel dropped into a chuck hole filled with water, is not guilty of contributory negligence as a matter of law, where he used all the care possible in coming down the descent and did not know of the existence of the hole, which he could not see on account of the water in it.

**SAME—DEFECTS—IMPLIED NOTICE—OTHER ACCIDENTS.** Implied notice on the part of the city of a defect in a street is sufficiently shown by evidence that the defect had caused previous accidents.

**SAME—CLAIMS—RESIDENCE OF CLAIMANT.** A claim against a city stating the residence at which the claimant had lived "during the past year" complies with the requirement that the claim shall give the place of residence for six months immediately prior to the filing of the claim.

**APPEAL—REVIEW—HARMLESS ERROR—VIEW BY COURT.** In an action tried to the court, a view of the premises without the consent of the appellant cannot be assigned as error where the trial judge did not take the view into consideration and rendered his decision entirely on the evidence.

Appeal from a judgment of the superior court for King county, Samuel H. Steele, judge *pro tempore*, entered September 8, 1916, upon findings in favor of the plaintiff, in an action for personal injuries sustained through a defective street, tried to the court. Affirmed.

*Hugh M. Caldwell* and *James A. Dougan*, for appellant.

*Gill, Hoyt & Frye* and *Frank E. Boyle*, for respondent.

<sup>1</sup>Reported in 166 Pac. 1131.

HOLCOMB, J.—This case arises from an injury received by respondent while he was driving a one-horse wagon down a very steep hill on a roadway known as Atlantic street, in Seattle. The injury occurred on July 21, 1910, at a point about thirty feet east of the intersection of Atlantic street with Ninth avenue south. The left front wheel of respondent's wagon dropped into a chuck hole in the street at the bottom of a steep descent, causing the wagon to lurch and tip, throwing respondent to the ground with great force and violence, and causing the injury set forth in his complaint. The street is open but not graded. The beaten track or roadbed proper is not straight but curved. The grade easterly from the point of the accident for a short distance is from fifteen to twenty per cent to a level place in Atlantic street, and thence easterly to Tenth avenue south the grade is about twenty-five per cent. Tenth avenue south, at the point of its intersection with Atlantic street, is graded and the approach to Atlantic street leveled off so that the grades of the two streets conform. Ninth avenue south was graded to a point where it intersects Atlantic street.

Respondent's testimony tended to show that the chuck hole which caused his wagon to lurch and tip was filled at the time with "soupy" mud, so he could not tell that it was deep and dangerous. Respondent started down Atlantic street from Tenth avenue south to Ninth avenue south. The first half of the distance between those avenues is very steep and the surface of the road is hard and smooth, so that an ordinary wagon wheel would slide over the same, and respondent, for that reason, used a rough lock on a rear wheel of his wagon to hold it back on the steepest part of the descent. At the middle of the block there is an alley; the street is fairly level at that point, and from there on down to Ninth avenue the street is not so steep. The surface of the ground at that time was soft and wet so that, when respondent came down over the steepest portion of the road to the level place, he removed the rough lock and applied the ordinary brake to his

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wagon, as in such ground the wheels would take hold. He was familiar with this street, had traveled over it for years, but had not been over this portion of the street for a period of a month or six weeks, and testified that the road was all right at the bottom of the hill the last time he was over it, in June preceding the accident. There was testimony that the street commissioner of the city had been notified on or about July 4, 1910, about fourteen days before the accident, of the existence of this chuck hole and the bad condition of the street. There was also evidence that another witness had slipped and fallen into this hole on or about July 4, 1910; and another witness, about three or four weeks before respondent was injured, had slipped into this chuck hole. Another witness had had his wagon tipped over at this spot about ten days before respondent was injured. This witness also testified that there was nothing about the place to put him on his guard. Another witness testified that an express wagon had tipped over at this same spot about ten days before respondent was injured. There was testimony that, in the previous March, no chuck hole was there.

It appears from the evidence that an addition, platting this street and dedicating it to the public, was platted on November 25, 1872, and filed for record in the official plat book of King county, and another addition, adding to some of these streets and alleys, was made, dedicating streets and alleys therein to the public on June 16, 1875, and filed for record in the official book of plats in the office of the county auditor. At that time no approval of such plats on the part of the municipal authorities was required by the law in force. *Thonney v. Rice*, 43 Wash. 708, 86 Pac. 713. Atlantic street appeared on those plats as Town street, Ninth avenue south was platted as South Eleventh street, and Tenth avenue south as South Twelfth street. In the year 1903, the city graded Tenth avenue south, the street running at right angles to Atlantic street, and constructed sidewalks along it. At the intersection of Tenth avenue south with Atlantic

street, the city leveled off and graded the approach to Atlantic street. In 1895 or 1896, the city council, by ordinance, changed the names of certain streets in Seattle. Town street was changed to Atlantic street, South Eleventh street was changed to Ninth avenue south, and South Twelfth street to Tenth avenue south. Thereafter, at the intersection of the streets, the city maintained signs marking the street. Houses along Atlantic street were numbered. A sidewalk was constructed along the south property line; not shown to have been constructed by the city, but shown to have been in constant use. Steps had been built at the west end of Atlantic adjoining Ninth avenue south. Both the sidewalk and road had been kept in repair by some one. Atlantic street had never been closed to traffic, but, on the contrary, had been openly, notoriously, and continuously used by the public for a period of time certainly exceeding ten years, possibly thirty years, according to the testimony. The city had never rejected or repudiated the street, but had never graded and improved it.

I. Appellant contends that the city was not required to keep in repair the place where respondent was hurt, although in a wagon track within the limits of the city. In support of this contention it cites these cases: *Ottolengui v. Seattle*, 59 Wash. 37, 109 Pac. 206; *Tait v. King County*, 85 Wash. 491, 148 Pac. 586; *Downend v. Kansas City*, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170; *Johnson v. St. Joseph*, 96 Mo. App. 663, 71 S. W. 106; *Willey v. People*, 36 Ill. App. 609; *Moore v. Cape Girardeau*, 103 Mo. 470, 15 S. W. 755. The cases from our own court we do not consider as supporting appellant's contention. In *Tait v. King County* and *Ottolengui v. Seattle*, the effect of the holding was merely to this extent: that, where a highway is dedicated to the public and approved by a board of county commissioners or a city council, the duty is not thereby cast upon the county or city of keeping every street or avenue, dedicated by the plat to the

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public use, *open for traffic*. And in such case, before the duty devolves upon a county or city to use reasonable care to keep a highway in reasonably safe condition for travel, it must have, either expressly or impliedly, invited the public to use such highway. But here the street was dedicated in 1875. It was in constant use by the public for a period of more than ten years. The city never closed it to travel, and did so far recognize it as a public street of the city as to change its name by ordinance. It graded the streets running at right angles to it on each end, and suffered and permitted it to be used without objection by vehicles of all kinds for a period long enough to establish a highway by prescription under the statutes of this state. It seems, therefore, that this case falls within the rule announced by this court, per Fullerton, J., in *Brabon v. Seattle*, 29 Wash. 6, 69 Pac. 365, and *Cady v. Seattle*, 42 Wash. 402, 85 Pac. 19. In the first case cited, it was said:

“It may be that the demands upon it did not require it to be graded or cleared for its full width, but the city, after having recognized it as a public street and permitted its use thereafter, was bound to maintain a reasonably safe way along it, sufficient to accommodate the travel upon it, and is liable, under the rule in this state, to one who, without fault, is injured thereon because of defects therein, while using it for a lawful purpose and in the manner it was intended to be used,”

citing authorities. And in the case last cited it was said:

“The city next contends that because it had never graded the street or formally opened it for travel, it cannot be held liable for injuries caused by its defective condition. But the evidence shows that the street was in one of the principal residence districts of the city; that it had been open for travel for a long time, and had been extensively used to the knowledge of the city’s officers. When a street is suffered to remain open by the city, and is in common use by the people, it is the duty of the city to keep it in ordinary repair. This is true whether or not the street has been formally accepted, or is what may be technically called an improved street.”

See, also, *Columbia & Puget Sound R. Co. v. Seattle*, 6 Wash. 332, 33 Pac. 824, 34 Pac. 725; *Carroll v. Centralia Water Co.*, 5 Wash. 613, 32 Pac. 609, 33 Pac. 431; *Rowe v. Ballard*, 19 Wash. 1, 52 Pac. 321; *McKnight v. Seattle*, 39 Wash. 516, 81 Pac. 998.

We therefore conclude that Atlantic street, where the injury occurred, was a public street of Seattle which the city, having left it open to use and travel with notice that it was so used, was required to keep in ordinary repair. It was not, of course, required to grade and improve it for its full width or to reduce its grades to the greatest extent possible, for, as it was open and used, the public had notice of all its grades and were accordingly bound to use such care as was necessary to prevent accident and injury.

II. The question then arises whether respondent did use such care as was necessary to avoid injury, appellant contending that he was guilty of contributory negligence which bars his recovery. We have stated the facts showing conditions existing and the precautions taken by respondent to descend the grade in a safe and careful manner. It was shown that he had not been over the road for the period of a month or six weeks, that he did not know of the chuck hole at the bottom, and that he was unable to see the depression because the ground in that vicinity was soft, the surface was level and smooth, and the depression filled with soupy mud. Had respondent been aware of the defective condition, contributory negligence *per se* would still not have been imputable to him, but he would be chargeable with a greater degree of care. *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. 799; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76. As he did not know of it, according to his evidence, and as he used all the care possible in going down the descent with his wagon, it cannot be said, as a matter of law, that he was guilty of contributory negligence.

III. The next contention of appellant is that the city had neither actual nor constructive notice of any defect. This

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proposition is defeated at the very outset by the fact that the trial court, who heard the testimony, found, upon competent testimony, that the city had actual notice. More than that, there is sufficient evidence to support the implied notice on the part of the city by reason of the evidence that the defect had caused previous accidents.

IV. The appellant contends that respondent's claim did not comply with the state law, in that it did not give the place of the residence of respondent for six months immediately prior to the filing of the claim. The claim contains the following statement: "I have lived in the city of Seattle during the past year at No. 1500 Tenth avenue south." It is claimed that the word "during" does not mean for the whole period of the year or for the whole period of any particular length of time; that therefore the claim does not comply with the statute. We are unable to agree with this view. The use of the word "during" certainly conveys the thought that the claimant had lived at the given place the entire time stated. A year being stated, it would certainly cover the period of six months. "During" means "throughout the course of," and "throughout the continuance of." 3 Words & Phrases (1st ed.), p. 2278. The claim was therefore sufficient.

V. The last contention of the appellant is that the trial court erred in viewing the premises where the accident happened without the consent of appellant. We find the trial judge declared that he did not take into consideration any view of the premises when rendering his decision, but rendered it entirely upon the evidence adduced at the trial. Certainly, therefore, we cannot presume that there was anything prejudicial to the appellant in the view of the premises by the trial court.

Finding no error, the judgment is affirmed.

ELLIS, C. J., MOUNT, FULLERTON, and PARKER, JJ., concur.

[No. 13937. Department One. August 6, 1917.]

NORTHWESTERN IMPROVEMENT COMPANY *et al.*, *Appellants*,  
v. PIERCE COUNTY, *Respondent*.<sup>1</sup>

TAXATION—ASSESSMENT—EXCESSIVENESS—EVIDENCE—SUFFICIENCY.

An assessment of coal lands for taxation will not be set aside as excessive where it was unquestionably supported by the testimony of two experts of undoubted learning and familiarity with the facts necessarily involved in their opinion, in view of the rule that the opinion of taxing officers in fixing land values will not be interfered with by the courts in the absence of arbitrariness of inequality, and the fact that the law presumes that the assessor fully performed his duty.

APPEAL—REVIEW—ERRORS FAVORABLE TO APPELLANT. Owners, alleging excessive taxation of coal lands, cannot complain of the methods of the court in reducing the assessments, in that it gave the owners the advantage of a reduction whenever certain expert witnesses testified to no value or did not uphold the assessor's valuation; since it was favorable rather than unfavorable to them.

Appeal from a judgment of the superior court for Pierce county, Albertson, J., entered September 18, 1916, upon findings in favor of the defendant, in consolidated actions to recover money paid and to secure the reduction of taxes, tried to the court. Affirmed.

*Geo. T. Reid, J. W. Quick, L. B. da Ponte, C. A. Murray,*  
and *H. S. Griggs*, for appellants.

*Fred G. Remann, Harry E. Phelps,* and *A. B. Bell*, for respondent.

MORRIS, J.—Owing to the size of the record and the amount of matter to be considered, the determination of this case has been delayed somewhat beyond its order. Appellants commenced three separate actions against Pierce county, seeking to reduce certain taxes and cancel others against coal lands belonging to appellants, and to recover judgment for taxes previously paid under protest. By stipulation of the parties,

<sup>1</sup>Reported in 167 Pac. 33.



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the suits were consolidated for the purpose of trial below, with a provision that a separate judgment be entered in each case. The lower court made findings reducing the taxes on some of the lands involved, cancelling others, and granting judgment in favor of two of the appellants for taxes previously paid under protest. These three suits involve the assessment for coal values of fifty-four sections of land. In 1908, some 19,727 acres of the land here involved, belonging to the Northwestern Improvement Company, were assessed on their coal values at \$179,690, and taxes levied in the sum of \$4,446.94 for the year 1908, and \$4,266.76 for the year 1909. In April, 1910, the Northwestern Improvement Company commenced an action complaining of this assessment, and obtained a judgment cancelling a part thereof, the lower court finding that the lands were not valuable for coal and restraining the collection of that part of the assessment levied on coal values. No attempt will be made to summarize the evidence. It is too long and too conflicting. We will, for the most part, content ourselves with the statement of the conclusions reached.

In the fall of 1913, W. I. Moulton, a timber cruiser and speculator in coal lands, acting under the direction of the county assessor, began gathering statistics upon which to base the valuation of these lands for the purpose of taxation. Moulton was more or less familiar with the land, having personally examined much of it and having at one time owned some of it. He went upon the land in November, 1913, for the purpose of making further examination with the view of ascertaining the value of the land as acreage and for timber and coal. In giving the result of his labors to the assessor, he gave not only his opinion based upon his personal examination, but as the same had been determined after an examination of the compiled data as to the land and after consulting with geologists, the state mine inspector, mine officials and other public officials in other states for the purpose of ascertaining their methods of fixing coal values for the purpose

of taxation. This report of Moulton's, compiled from the above sources, was made the basis by the assessor for the assessment roll for the years 1913 and 1914, and was divided between the three appellants as follows: Northwestern Improvement Company, approximately 17,000 acres, \$287,250; St. Paul & Tacoma Lumber Company, approximately 3,200 acres, \$41,375; Connellsville Coal & Coke Company, approximately 960 acres, \$6,645. Appellants, being dissatisfied with these assessments, brought this action and appealed from adverse decree.

The evidence is bulky and conflicting. A number of witnesses with much practical experience in coal mining testified on behalf of the appellants and were generally of the opinion that the land had little value as coal land; that about the only value that could be given the land was of a speculative nature. No recent sales were shown. Neither does it appear that any of the land had been offered for sale of late years. So that, in reaching a conclusion as to the value of these lands as coal lands, such conclusion must be based almost entirely upon the opinion of various witnesses. In its behalf respondent called Moulton, who had gathered the data from which the assessments were compiled, R. P. Tarr, a graduate geologist, who had been in the employ of the Northwestern Improvement Company for some nine years prior to the trial, and Professor Bailey Willis, a man of recognized standing as a geologist with much experience as a geological investigator and in the making of geologic surveys. Willis had made an extensive survey of these lands in the years 1881 to 1884 and had compiled a report. He made a second examination in 1896.

The lower court seems to have been influenced in reaching its conclusion largely by the testimony of Tarr and Willis. On what they consider a conservative estimate, these two witnesses, based upon their knowledge of these particular lands and as experts on the subject of coal lands in general, testified that these lands contained many millions of tons of min-

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able coal. It also appeared that the owners of these lands had, from time to time, given leases on royalties and had thus established a measure of the royalty value of each ton of coal. With this royalty measure thus established and upon their estimate of the number of tons of coal, Tarr and Willis fixed their values as coal properties. They do not agree as to the value of the land in each section, and at times their values are far apart. In their opinion, much of the land is more valuable than is shown by the valuations fixed by the assessment roll, while some of it is of less value. It is apparent, by reason of the fact that some of the coal is inferior in quality to the product of competing mines in the same district, that, up to the present time, but little, if any, profit has been derived from any development of the land as coal properties, but it is also clear that, notwithstanding this fact, there has never been any abandonment of the property as a coal mining proposition. A summary of the lower court's conclusion may be found in the following excerpt from its decree:

"Let a decree be entered striking from the assessment rolls all of the taxes levied for coal valuations upon the lands which under the testimony of Prof. Willis and Mr. Tarr are without such value, and reducing the valuations for coal of all of the lands involved in the three consolidated cases to the maximum value for coal to be found in their testimony where their estimate was below the amount of the assessment. Of course the assessment against the different parcels of land on account of coal cannot be increased beyond the amount extended on the rolls, even though in the opinion of these witnesses that estimate was below the actual fifty per cent value, as this court cannot act as a board of equalization."

In reviewing these assessments, we must bear in mind that we are dealing largely with questions of opinion as to the value of these lands for the purpose of taxation. It has too long been the law to be now doubted that equity will not interfere to set aside the opinion of taxing officers in fixing the

value of lands for purpose of taxation until it is shown that such arbitrariness or inequality enters into the assessment as to violate the fundamental principles of taxation. It is also well settled that, in making an assessment, it is presumed the assessor has only performed his full duty, and the burden of showing otherwise is cast upon those who attack it.

“The assessor and board of equalization act in a *quasi* judicial capacity in making or equalizing assessments. The law presumes that they have performed their duty in a proper manner. Where the rights of the public require it, the presumption in favor of due performance is liberal, and the evidence to overthrow it must be clear.” *Templeton v. Pierce County*, 25 Wash. 377, 382, 65 Pac. 553.

See, also, *National Lumber & Mfg. Co. v. Chehalis County*, 86 Wash. 483, 150 Pac. 1164; *Hillman's Snohomish County Land & R. Co. v. Snohomish County*, 87 Wash. 58, 151 Pac. 96; *Heuston v. King County*, 90 Wash. 200, 155 Pac. 773.

There can be no question but what the testimony of the respondent's witnesses clearly supported the assessment upon these lands. Even with no testimony to support it, there will be a clear presumption in favor of the correctness and fairness of the valuations placed upon these lands by the assessor, and we cannot find, without in the most part disregarding the testimony in behalf of respondent, that appellants have sustained the burden of showing excessive values. *Heuston v. King County*, *supra*. We have, therefore, not only the presumption in favor of these assessments, the findings of the lower court sustaining them in the main, but the testimony of at least two witnesses of unquestioned learning and undoubted familiarity with the facts necessarily involved in the opinions expressed by them, which, after most careful compilation of data, support, at least in the amount of the judgments, the values fixed by the assessor. Realizing the value of these two witnesses to respondent, appellants discuss their testimony at great length and undertake to show the fallacy of their reasoning. We are, however, unable to find

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anything in the record which convinces us that their testimony should not be given due consideration, especially after the trial judge, a careful trier of fact, having the witnesses before him with due opportunity for examination, and reaching a conclusion as to the weight and value of their testimony, has entered a decree supporting in the main the contention of respondent.

Appellants also complain of the method employed by the lower court in reducing the assessment upon these lands in employing the value nearest approaching the assessed value placed by Tarr or Willis upon each section of the land. They seem to be of the opinion that the lower court disregarded the testimony of these witnesses when favorable to appellants and accepted it when unfavorable. The decree, however, is not subject to this criticism. What the lower court really did was to give appellants advantage of a reduction whenever these two witnesses testified to no value, and when the value placed upon any section by the assessor was not upheld by either, appellants were again favored by a reduction in value equal to the nearest approach to the assessor's value placed upon any section by either of the witnesses. Such a method seems to us to be favorable rather than unfavorable to appellants' contention as here made, and the result is their obtaining the relief granted them by the decree.

Numerous other contentions are made in appellants' behalf, most of which are answered by what has already been said. Others involve a detailed discussion of the evidence, which would add nothing to the value of this opinion. Upon the whole case, we are of the opinion that the judgment should be affirmed. It is so ordered.

ELLIS, C. J., and MAIN, J., concur.

[No. 13344. Department Two. August 6, 1917.]

WEYERHAEUSER TIMBER COMPANY *et al.*, Respondents, v.  
PIERCE COUNTY, Appellant.<sup>1</sup>

**APPEAL—RECORD—ABSTRACT.** Upon cross-appeals, the defendant's abstract of the record will not be stricken because the defendant took no exceptions to the findings nor because defendant's brief did not sufficiently refer to the pages of the abstract, where it may be treated as supplemental to the plaintiffs' abstract, which the statute permits, and has been useful in marshaling the contents of the record.

**TAXATION—VALUATION FOR ASSESSMENT—EXCESSIVENESS—EVIDENCE—SUFFICIENCY.** An assessment of timber and timber lands for taxation will be set aside as arbitrary and discriminatory where the assessor adopted old valuations without revision in the face of a depreciation in the market value, and without applying the 50 per cent basis for assessment, and in applying the zone system without relation to the quality or accessibility of the timber on any given tract, which was prohibitive of the exercise of any personal judgment on the part of the taxing officers.

**SAME.** The valuation of all hemlock timber at the flat rate of 25 cents per thousand throughout the county will be set aside as excessive or arbitrary, where the evidence shows that hemlock had such value only where it is in sufficient quantity and accessible, and that much of it was of little commercial value, having only a speculative future, and that the assessor adopted without change the work of a prior assessor made at a time when the market was higher.

**SAME.** An assessment of timber and timber lands will not be set aside because the assessor in addition to the value of the timber included a "land value," where there was evidence that logged-off lands were of some value, and there was no separate assessment of the land, the statute, Rem. Code, §§ 9095, 9222-1, permitting the separate assessment of timber only in case of separate ownership; but the assessor having adopted a 60 per cent instead of a 50 per cent basis of valuation for assessment purposes, a reduction will be made accordingly to correspond with other classes of property.

**SAME—EXCESSIVE ASSESSMENT—EVIDENCE—ADMISSIBILITY.** In an action to reduce excessive assessments, evidence of assessments in prior years is admissible for the purpose of showing that the prior assessments were adopted and were made on a basis of 60 per cent when the law now in force requires a fifty per cent basis.

<sup>1</sup>Reported in 167 Pac. 35.

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Cross-appeals from a judgment of the superior court for Pierce county, Clifford, J., entered November 6, 1915, upon findings in favor of the plaintiffs, in consolidated actions to cancel taxes and to recover taxes paid under protest, tried to the court. Modified on plaintiffs' appeal.

*Fred G. Remann, Harry E. Phelps, and A. B. Bell*, for appellant.

*L. B. da Ponte, W. L. McCormick, Geo. T. Reid, J. W. Quick, and C. A. Murray (F. M. Dudley and H. S. Griggs, of counsel)*, for respondents.

ELLIS, C. J.—The Weyerhaeuser Timber Company and the Northwestern Improvement Company began separate actions against Pierce county for the cancellation of a portion of the taxes assessed against certain timber lands for the year 1914 on the ground of overvaluation, and for recovery of excess payments made under protest. By stipulation the two actions were consolidated for trial, with an agreement that separate judgments be entered. Supplemental complaints were filed presenting the same issue as to the assessed valuations for the year 1915, upon which taxes were not then due. The Weyerhaeuser Timber Company sought a reduction of \$24,130.58 on its tax of \$60,152.65, and the Northwestern Improvement Company a reduction of \$5,648.65 on its tax of \$9,772.34. The trial court found that plaintiffs were entitled to a 16 2-3 per cent reduction in the amount of the valuations upon which they had been assessed, gave judgment to the Weyerhaeuser company in the sum of \$11,314.17 for the excess taxes of 1914 paid under protest, and decreed an equivalent reduction of the taxes falling due for the year 1915. In the case of the Northwestern Company, the court gave judgment canceling its taxes in the sum of \$1,628.72 for the year 1914, and in the sum of \$1,642.52 for the year 1915, the variation in amounts being due to the fact that the assessor had, in certain instances, increased the valuation for the latter year over that of the preceding year. From these

judgments, the plaintiffs and defendant both appeal, the former claiming they are entitled to a further reduction in valuations, the latter that the court erred in granting any reduction. To avoid confusion we shall refer to the parties throughout as plaintiffs and defendant.

Plaintiffs have moved to strike the abstract of the record filed by defendant in support of its appeal. It is urged that it has no place in the record because defendant took no exceptions to the court's findings of fact (*Harbican v. Chamberlin*, 82 Wash. 556, 144 Pac. 717); and further, that it is useless, in that defendant's brief insufficiently refers to the pages of the abstract for verification. Rule VIII, 71 Wash. XLIX. Regardless of defendant's cross-appeal, its abstract may be treated as supplemental to that filed by plaintiffs on their own appeal. Such an abstract the statute permits a respondent to supply. Though not referred to in defendant's brief as freely as could be desired for the convenience of the court, this abstract has been useful, alike with that of plaintiffs', in marshaling the contents of a voluminous record. The motion is denied.

Plaintiffs contend that their properties were subjected to an arbitrary and excessive valuation, in that (1) they are now assessed at values placed on them at the height of a boom in the lumber industry, and that, at the time of assessment, suit and trial, lumber values had depreciated from thirty to fifty per cent; (2) that an arbitrary zone system was employed resulting in a valuation of \$1 per thousand being placed on their fir timber within one mile of a logging road or other outlet, and a reduction of five cents per thousand with each mile of recession from such road or outlet, regardless of logging conditions and the quality and accessibility of the timber; (3) that all hemlock, regardless of quality and accessibility, was assessed on an arbitrary valuation of 25 cents per thousand; (4) that, in addition to the valuation of the timber for more than it was worth, a land value averaging \$1.75 per acre was included; and (5) that,



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for the years 1914 and 1915, all of the property in Pierce county, save timber lands and other unimproved lands, was assessed on a basis not exceeding fifty per cent of the true value in compliance with the act of 1913 (Rem. Code, § 9112), while timber lands and unimproved lands were assessed as before on a basis of sixty per cent, which course was arbitrary and unconstitutional.

We shall first take up the claim of plaintiffs as to the valuation of the fir timber, including cedar and spruce, for the years 1914 and 1915. In order to obtain a clear understanding of the situation, it is necessary to recur to the work of the assessor's office for prior years. The evidence shows that, in the year 1908, all property in Pierce county was valued by the assessor for assessment purposes on a basis of sixty per cent of its full value. In fixing the values of fir timber, he adopted a zone system, placing the assessment value within one mile of a railroad, logging road or other outlet at \$1 per thousand feet, and reducing the values five cents per thousand for each additional mile until a minimum of fifty cents was reached, which minimum was thereafter applied regardless of added distances. In making these figures, it fairly appears that the assessor failed to take into consideration the elements of quality and quantity of timber, its accessibility and the logging conditions. The values fixed by the assessor in the year 1908 were adopted in each subsequent biennial valuation for assessment without material change, and are the figures now in issue as the assessment values for the years 1914 and 1915. By the act of 1913 (Rem. Code, § 9112), it is provided that "all property shall be assessed at not to exceed fifty per cent of its true and fair value in money." In making his assessment for the years 1914 and 1915, the assessor reduced the value of all property, excepting timber lands and unimproved property, to a figure not exceeding fifty per cent of its full value, while continuing in force the old 1908 assessment on a sixty per cent basis without reduction as to timber lands and unimproved property; this, not-

withstanding the fact, as the evidence shows, that timber values had depreciated fully 25 per cent at the time the assessment in dispute was made. The valuation in 1908 was made at a time when the lumber industry in this state had reached the highwater mark, from which stage it had steadily subsided until the period covered by the years 1914 and 1915.

The trial of this action was had in 1915, and the evidence of values prevailing at that time and at the time of the assessment is widely divergent, the witnesses for plaintiffs generally placing the values lower than plaintiffs concede, while the witnesses for the county in some cases exceed the assessor's values. But averaging the figures of all the witnesses on both sides, we believe, invariably results in a valuation lower than that fixed by the assessor. For instance, in township 16 north, range 3 east, the average assessed value is 70.8 cents per thousand, and the average value placed by the witnesses is 48 cents, while the plaintiff concedes a value of 41.5 cents. In so far as the credibility of witnesses is concerned, those for plaintiffs are sustained in large part by the cruise of timber lands made by the county in the year 1907 for use in the assessment of timber lands for taxation. This cruise is in evidence, and the court found "that said cruise was made and that it was a careful, accurate and correct cruise, and has been admitted to be such by both of the parties." A sample comparison of an assessment with the cruise description will be of interest. The cruise describes the fir timber on the east one-half of section 13, township 16 north, range 3 east, as small and of inferior quality, while the west half has "some good logs." On 1,837 feet, standing two-thirds on the east side and the balance on the west, the high assessment valuation of \$1.15 is placed, which plaintiff asks to be reduced to 40 cents. The highest valuation placed on land in that township by the county's witness Flint was only \$1.25, which on a fifty per cent basis for assessment would be 62.5

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cents. The inequality in the work of the assessor finds further demonstration in his failure to place the same ratings upon different tracts of timber practically equivalent in quality, quantity and logging conditions. For instance, in township 18 north, range 6 east, the fir and cedar in section 23 is rated at \$1.20, while in section 15 it is rated 85 cents. In the former the fir is "old growth, sound and smooth," the cedar "strictly shingle timber, a great many trees will go to pieces in falling." In the latter the fir is "large, smooth and sound, first-class timber," and the same description applies to the cedar. Section 15 shows a somewhat higher grade, and is one-half mile nearer railroad transportation, yet is valued 35 cents lower than section 23. All the timber on which reductions are sought is located in rough, broken, and in some cases mountainous districts where logging conditions are unfavorable and often practically prohibitive. The figures obtained from averaging the testimony discloses an overvaluation by the assessor to the extent of at least 25 per cent, and this is supported by the disclosures of the cruises in evidence. The cruises, which are records in the assessor's office, tend to show either arbitrary action or marked inadvertence in making the valuations upon the lands here in controversy. The apparent fact that the assessor merely adopted the figures of an assessment made six years earlier certainly fails to show the exercise of an advised and mature judgment. And it is undisputed that the value of timber had depreciated to a very considerable extent at the time the assessment of 1914 was made. The assessor himself testified before the state board of equalization as follows:

"Now, in regard to timber land, you will find that we have generally kept the assessable values of timber lands in Pierce county up to about what they were formerly. . . . Milling properties, as we all know, have gone down greatly in the last year, especially in this county. . . . Many of them have gone out of business; it is a hard row for the milling interests. . . . We have kept those values too high. They are too high now, and it is almost criminal with the condi-

tions of the timber interests to hold their values up the way we have done for assessable purposes.”

The evidence is extremely voluminous. We have examined it carefully and it is obviously impracticable to discuss it more in detail. It must suffice to state our conclusions. We are satisfied that the assessor did adopt the old valuations of 1908 without revision in the light of the current market value of timber and timber lands, and without applying the fifty per cent basis for assessment, and that this course was arbitrary and discriminatory. We are further satisfied that the original valuation of these timber lands in 1908 was made upon a fundamentally wrong basis or theory, in that the zone system employed had no relation to the quality or accessibility of the timber on any given tract, and was essentially arbitrary and prohibitive of the exercise of any personal judgment on the part of the assessing officers as to actual value of these fir, cedar and spruce timber lands. For a decision expressly so holding, see *Hersey v. Board of Supervisors of Barron County*, 37 Wis. 75. Finally, we are satisfied from all of the evidence that these things have resulted in making the fir, cedar and spruce timber valuations excessive to the extent of at least twenty-five per cent.

Turning now to the hemlock timber, we find that it was assessed for the years here in question at a flat rate of 25 cents per thousand throughout the county. Plaintiffs claim that this valuation was placed without regard to quality, accessibility or logging conditions, and that, taking these elements into consideration, their hemlock values should be reduced to values ranging from 2.5 cents to 20 cents per thousand upon various sections. This would result in an average valuation upon the Northwestern Improvement Company's lands of 9.5 cents per thousand, and upon the Weyerhaeuser lands of 10.5 cents per thousand. The reduction made by the trial court, from a sixty per cent to a fifty per cent basis of valuation, produced a value for assessment of 20.8 cents instead of 25 cents per thousand. The evidence

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shows that good hemlock undoubtedly has a full value of fifty cents per thousand where it is in sufficient quantity and easy of access for logging. While some of the hemlock in dispute meets these requirements, it is clear that most of it does not. Much of it is described as small, rough, limby, knotty, scrubby, conky and poor, while some is described as medium and second class. On a few of the sections it is of first class quality and abundant. It appears from the evidence that it did not pay to log hemlock, since it had very little commercial value at the time of trial. It has a tendency to rot where exposed to the elements, but it is conceded that it has a value for interior use in buildings. Undoubtedly hemlock has a value, but the quality and logging conditions of most of that in controversy renders it practically unmarketable. It is located upon steep and broken territory, in great part inaccessible to logging roads and without streams capable of being utilized as an outlet, owing to precipitous banks and rocky bottoms. This class of timber is described by some of the witnesses as having only a speculative future value, and as practically worthless at the present time.

Carefully considering the testimony of all the witnesses, we find that they place an average assessment value on the Northwestern company's hemlock of 16 cents per thousand, and upon that of the Weyerhaeuser company of 21 cents. In the case of the latter company's hemlock, this valuation by the witnesses is substantially the amount to which the trial court found they were entitled, and no further reduction would be warranted. But in the case of the Northwestern company, we think the evidence justifies a reduction to the extent of 25 per cent of the assessed valuations, or a value of  $18\frac{3}{4}$  cents per thousand. The very fact of the imposition of a flat rate of valuation by the assessor, in the light of the evidence, shows that he did not exercise his judgment by taking into consideration the real values of the different tracts of hemlock. This is further confirmed by the fact that he adopted without change the work of a prior assessor, made

at a time when the market value of all timber was admittedly higher and when the valuation then made and here adopted was regarded as being sixty per cent of the higher actual values existing at that time.

In making this assessment the assessor included also a "land value," not for the purpose of separately assessing the land, but as an element of value to be considered in assessing the land with the timber it bears as real estate. This land value for assessment purposes was placed at from \$1 to \$3 per acre, resulting in an average valuation of \$1.75 per acre on the lands here involved. The Weyerhaeuser Timber Company contends that the lands have no value except to carry the timber, and inasmuch as the timber was assessed to the value allowed by law, that value absorbed the land value and the further assessment of the lands was illegal. The evidence shows that timber lands were usually valued only for the timber upon them, and were bought and sold on that basis. But it further appears that logged off lands are generally held by the lumberer for sale, the evidence showing prices in some instances of \$3 per acre. The evidence shows that some of the land in controversy could be utilized for agriculture and some for grazing, but a considerable part is fit only for reforestation. Such evidence is sufficient to show that the land carries some value in and of itself aside from the timber.

Plaintiff does not specifically attack the valuations on any tract as being excessive as a land valuation, but its position, in effect, amounts to a charge that an assessment both on the land and on the timber constitutes double taxation of the same property. It seems a sufficient answer to say that the land was not separately assessed nor separately taxed. It was merely considered as an element of value which, with the value of the timber, goes to make up the value of the whole as real estate. Plaintiffs' view does not seem tenable under our system of taxation requiring all real property to be assessed unless specifically exempted. Our statutes (Rem. Code, §§ 9095 and 9222-1) permit the separate taxation of

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standing timber only in case the land and the timber are held in separate ownership. This is a legislative recognition of the fact that the land value is not absorbed in the timber value, but is an element of value to be considered in the assessment of timber lands when both land and timber are held in the same ownership. Real property for purposes of taxation is defined by Rem. Code, § 9092, as including "the land itself . . . and all rights and privileges thereto belonging, or in anywise appertaining." We cannot escape the conclusion that land has some intrinsic value aside from what it carries and, as such, is subject to taxation, however great or small may be the value of the appurtenant timber. While it would seem that lower land values would be appropriate in this case, there is no evidence of arbitrary action on the part of the assessor so far as the land values are concerned, beyond the fact of his adoption of a sixty per cent instead of a fifty per cent basis of valuation for assessment purposes. That inequitable factor permeates the whole assessment. Plaintiff is entitled to the 16 2-3 per cent reduction made by the trial court in the element of "land values," the same as in the element of the timber values of its real estate. This ruling does not apply to the Northwestern company, since in this action that company does not seek a reduction in "land values."

The law of this case is comparatively simple. It is well settled that the assessor and board of equalization act in a quasi-judicial capacity, that the law presumes that they have performed their duties in a proper manner, that this presumption will be liberally indulged, and that the evidence to overthrow it must be clear. *Templeton v. Pierce County*, 25 Wash. 377, 65 Pac. 553; *National Lumber & Mfg. Co. v. Chehalis County*, 86 Wash. 483, 150 Pac. 1164; *Hillman's Snohomish County Land & R. Co. v. Snohomish County*, 87 Wash. 58, 151 Pac. 96; *Hueston v. King County*, 90 Wash. 200, 155 Pac. 773; *Northwestern Improvement Co. v. Pierce County*, ante p. 528, 167 Pac. 33. But it is equally well set-



tled in this state that, where the evidence shows arbitrary or capricious action on the part of the assessing officer rather than the exercise of an honest judgment, or shows that he proceeded upon a fundamentally wrong basis or theory in making the assessment, the courts will grant relief against an overvaluation of real property, and this regardless of the action of the board of equalization in the premises. *First Thought Gold Mines, Limited, v. Stevens County*, 91 Wash. 437, 157 Pac. 1080; *Northern Pac. R. Co. v. Benton County*, 87 Wash. 534, 151 Pac. 1123. It is also well settled that there is neither that uniformity nor equality which the law requires, where all kinds of property save one are designedly and of fixed purpose assessed at less than a given percentage of their full and fair value, while that one class of property is assessed at a greater percentage of such value.

“Such an arbitrary policy is vicious in principle, violative of the constitution, and operates as a constructive fraud upon the rights of the property holder discriminated against. In such cases equity will grant relief.” *Spokane & Eastern Trust Co. v. Spokane County*, 70 Wash. 48, 126 Pac. 54, Ann. Cas. 1914B 641.

See, also, *Spokane & I. E. R. Co. v. Spokane County*, 82 Wash. 24, 143 Pac. 307, and *Greene v. Louisville & Interurban R. Co.*, 244 U. S. 499.

Though this court has held that it will not interfere with an assessment upon the sole ground of excessive valuation, in the absence of some showing of actual fraud or arbitrary action, unless the assessment be so great as to amount in itself to fraud in law (*Northern Pac. R. Co. v. State*, 84 Wash. 510, 147 Pac. 45, Ann. Cas. 1916E 1166; *Hueston v. King County*, *supra*), it is obvious that this rule has no application to a case where the evidence shows such actual arbitrary action.

Applying the evidence in the light of these well established principles, we are constrained to direct the modification of the judgment in the following particulars: On plaintiffs’



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appeal, the judgment of the trial court will be modified to the extent of granting plaintiffs a 25 per cent reduction on the fir, cedar and spruce values for the years 1914 and 1915 upon all that class of timber in controversy in this action. As to the hemlock timber, the Weyerhaeuser Timber Company will be granted a 16 2-3 per cent reduction on such timber located in township 16 north, in ranges 5 and 6 east, township 18 north, range 6 east, and township 19 north, in ranges 7, 8 and 9 east. The Northwestern Improvement Company will be granted a 25 per cent reduction in the assessed value of its hemlock timber in townships 15, 16, 17, 18 and 19 north, range 6 east. The "land values" of all the lands of plaintiff Weyerhaeuser Timber Company here involved will stand as reduced by the trial court 16 2-3 per cent to bring it to fifty per cent of full value corresponding with other classes of property. These reductions are not to be considered as additional to the general reduction made by the trial court, but as including that reduction.

By its cross-appeal, defendant assigns as error the action of the trial court in making a 16 2-3 per cent reduction. What we have said touching plaintiffs' appeal sufficiently disposes of this assignment.

Some complaint is also made of the action of the trial court in admitting in evidence assessments for years prior to those involved in the present controversy. We think, however, that this evidence was admissible on two grounds—for the purpose of showing that the assessor, in making the 1914 and 1915 assessments, merely adopted the valuation of prior assessors without a proper exercise of his own judgment, and for the further purpose of showing that these adopted valuations were upon a sixty per cent basis when the law in force in 1914 and 1915 required a fifty per cent basis.

The cause is remanded with instructions to the trial court to modify the judgment in accordance with this opinion.

CHADWICK, MAIN, and PARKER, JJ., concur.

[No. 14091. Department Two. August 6, 1917.]

*In the Matter of the Estate of AMAZIAH SPRINGER.*<sup>1</sup>

**MORTGAGES—EQUITABLE MORTGAGE—REQUISITES—POWER OF ATTORNEY.** Under Rem. Code, §§ 8745, 8746, 8750, requiring all conveyances of real estate or any interest therein and all contracts creating any incumbrance upon real estate to be by deed, and all deeds to be in writing, signed by the party to be bound and acknowledged, an irrevocable power of attorney to receive and hold in trust, as collateral security, an heir's interest in an estate, does not constitute an equitable mortgage upon the interest of the heir in real property inherited by him; since it contains no word of grant referring to the title to real property, or giving the attorney power to convey the same, and since his intent to incumber the property must, in the light of the statute of frauds, be found in the writing itself.

**PRINCIPAL AND AGENT—POWER OF ATTORNEY—RECITALS—ESTOPPEL.** A reference in a power of attorney to a supposed assignment, does not estop the principal from denying the existence of the assignment, where it was immaterial to the essential purpose of the power.

Appeal from a judgment of the superior court for King county, Edward H. Wright, J., entered December 16, 1916, in favor of a certain lien claimant, in an action to determine conflicting claims of creditors to the distributive share in real property inherited by a judgment debtor, tried to the court. Affirmed.

*Walter Metzenbaum* and *S. H. Kellernan*, for appellants.

*McClure & McClure* and *Walter S. Osborn*, for respondent.

**PARKER, J.** — This is a controversy between creditors of Benjamin F. Springer, claiming liens upon his one-eleventh distributive share of the real property inherited by him from his brother, Amaziah Springer, deceased. The First National Bank of Crestline, Ohio, and the Kriell-French Piano Company claim first liens upon the property under a power of attorney executed by Benjamin F. Springer to William Monteith, which they claim became in effect an equitable assign-

<sup>1</sup>Reported in 166 Pac. 1134.

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ment of or mortgage upon the entire interest of Benjamin F. Springer in his deceased brother's estate to secure the indebtedness owing by him to them which is here sought to be recovered. Stultz Brothers, a corporation, claims a superior lien upon the interest of Benjamin F. Springer in the real property inherited by him from his deceased brother, under the levy of an attachment issued out of the superior court for King county in an action commenced therein by Stultz Brothers against Benjamin F. Springer seeking recovery of a debt due it from him, in which action judgment was rendered against him. These lien claimants all appeared in the probate proceedings for the administration of the estate of Amaziah Springer in the superior court for King county, asserting their respective claimed interests in the one-eleventh distributive share of the estate of Amaziah Springer, and asked distribution accordingly. Distribution was made by the superior court in effect subjecting the interest of Benjamin F. Springer in the property inherited from his brother to the payment of the debts due by him to these claimants, "subject to the subsequent adjudication of the rights of said persons as between themselves." The decree also directed that the claimants "file in this cause pleadings setting forth their respective claims to said undivided one-eleventh interest." Pleadings were accordingly filed by the respective claimants and, upon the issues so made, trial was had, resulting in judgment in favor of Stultz Brothers, adjudging in effect that its attachment and judgment lien constituted a prior and superior lien to that of the other claimants to the interests of Benjamin F. Springer in the real property inherited from his deceased brother. From this disposition of the controversy, the claimants William Monteith, First National Bank and Kriell-French Piano Company have appealed to this court.

Amaziah Springer died intestate in the year 1908, leaving eleven brothers and sisters as his only heirs at law, one of whom is Benjamin F. Springer. Sarah Springer became the

duly appointed and acting administratrix of Amaziah Springer's estate, which continued in the course of administration in the superior court for King county up until the determination of this controversy in that court. Amaziah Springer left in King county the real property the undivided one-eleventh of which is here in question. On the 18th day of July, 1910, Benjamin F. Springer executed and delivered to William Monteith the following writing:

"Power of Attorney

"Know all men by these presents, That I, Benjamin F. Springer of Crestline, Ohio, do hereby constitute and appoint William Monteith of the same place, my attorney in fact, for me and in my name to receive from and receipt to Sarah Springer, administratrix of the estate of Amaziah Springer, deceased, for any and all money and property coming to me as an heir of said decedent or otherwise, less the sum of \$721 assigned to the Kriell-French Piano Co.

"My said interest in said estate to be received by my said attorney and held by him in trust, as collateral to secure the payment of any promissory notes or renewals that I may at any time owe to the First National Bank of Crestline, Ohio, and to the extent of my liabilities to said bank, this power of attorney is not revocable, hereby ratifying and confirming all things my said attorney shall do relating to the powers hereby granted and given him, or incident thereto.

"In testimony whereof, I have hereunto set my hand and seal this 18th day of July, 1910.

"Benjamin F. Springer (Seal)

"Signed and acknowledged in our presence.

"P. W. Poole

"F. P. Hayes

"The State of Ohio,

"Crawford County.

"Before me, a notary public in and for said county, personally appeared the above named Benjamin F. Springer and acknowledged the signing of the above power of attorney to be his free and voluntary act.

"In testimony whereof I have hereunto affixed my name and official seal this 18th day of July, 1910.

"P. W. Poole, Notary Public.

"(Notarial Seal)      My commission expires July 10, 1913."

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In August, 1912, respondent, Stultz Brothers, commenced an action in the superior court for King county seeking recovery from Benjamin F. Springer upon certain promissory notes executed by him evidencing his indebtedness to Stultz Brothers. At the same time, Stultz Brothers caused a writ of attachment to issue in that action, by virtue of which, on the 15th day of August, 1912, the sheriff of King county levied upon and attached all the right, title and interest of Benjamin F. Springer in and to the real property inherited by him from his deceased brother in King county, properly describing that property in his certificate of levy. Thereafter judgment was rendered in that action in favor of Stultz Brothers and against Benjamin F. Springer for \$1,231.60. This judgment and attachment lien was held by the superior court to be superior to the claims of the bank and the piano company.

The real problem here for our consideration is, Does this power of attorney constitute an equitable mortgage upon the interest of Benjamin F. Springer in the real property in question? Counsel for appellants invoke the law of equitable assignments, and especially the liberal rule of construction which equity follows in determining the intention of the parties from language, oral or written, which may be claimed to constitute an equitable assignment. The authorities relied upon by counsel, however, have to do almost wholly with equitable assignments of personal property, or to funds which have a prospective existence. The property here involved is real property only, and we are reminded that:

"All conveyances of real estate or of any interest therein, and all contracts creating or evidencing any encumbrance upon real estate shall be by deed,"

and that all such deeds shall be in writing, signed by the party to be bound thereby and acknowledged. Rem. Code, §§ 8745, 8746, 8750.

We are, therefore, confronted with this statute of frauds, and before it can be held that this power of attorney is an

equitable mortgage, there must be found upon its face language evidencing an intent on the part of Benjamin F. Springer to convey or mortgage his interest in the real property inherited by him to secure the payment of his debts owing to appellants. That the title to the real property acquired by inheritance from his brother was then fully vested in Benjamin F. Springer, subject only to the debts of his brother's estate and the expense of administration, is well settled law. Rem. Code, § 1366; 9 R. C. L. 121. From which it follows as a matter of course that he could then voluntarily convey or encumber such real property by a deed, but not otherwise. Now, conceding that the power of attorney would be sufficiently executed as a deed or encumbrance so far as its signing and acknowledging are concerned, can its language be construed as evidencing an intent on the part of Benjamin F. Springer to thereby convey or mortgage his real property to secure his indebtedness owing to appellants. It contains no words of grant whatever, such as are common to deeds and mortgages. It simply appoints William Monteith attorney in fact to receive from the administratrix "any and all money and property coming to me as an heir of said decedent [his brother] or otherwise, less the sum of \$721 assigned to Kriell-French Piano Co." Clearly this does not divest Benjamin F. Springer of any interest in, or in any manner encumber, his real property. It is true that this language is followed by the words, "my said interest in said estate to be received by my said attorney and held by him in trust as collateral to secure payment of any promissory notes or renewals that I may at any time owe to the First National Bank of Crestline, Ohio." But even here we have no words referring to the title to real property. It is also to be noted that, while every act to be done by William Monteith authorized by the power of attorney is to be done as the agent and in the name of Benjamin F. Springer, there is a total absence of any grant of power to William Monteith to convey the real property or to do anything with it looking to the subjecting of it to the

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satisfaction of any of the debts of Benjamin F. Springer. In the text of 2 C. J. 556, we read:

"A power of attorney, being a formal instrument, must be strictly construed according to the natural import of its language, and the authority conferred is not to be extended beyond that which is given in express terms, or which is necessary and proper to carry into effect that which is expressly given."

The rule thus stated is amply supported by authority, and is peculiarly applicable to powers of attorney relied upon as relating to real property. We think it is plain that, whatever may be said touching the effect of this power of attorney as a possible equitable assignment of personal property which might be delivered by the administratrix to William Monteith upon the close of the administration, it can in no event be held to constitute an equitable mortgage of the real property of Benjamin F. Springer. It may be that, at the time of the execution of the power of attorney, there existed in the mind of Benjamin F. Springer an intent that the real property inherited from his brother should be subjected as mortgaged property to the satisfaction of his debts owing to appellants, and that the recitals therein might lend some aid, with other circumstances not appearing from its language, to prove such intent, but it seems plain to us that such intent cannot be gathered from the language of the power of attorney alone. It must be remembered that we are dealing with the question of Benjamin F. Springer's intent in the light of the statute of frauds, and that it is, therefore, not enough that Benjamin F. Springer's intent to incumber his real property as by mortgage could be found by facts deducible from other evidence, but such intent, to be rendered effective, must be found in this writing. We are of the opinion that no such intent is evidenced therein, and conclude that the lien of respondent's attachment and judgment upon the real property of Benjamin F. Springer is superior to the claim of the First National Bank of Crestline, Ohio. Our decision in *Hossack v. Graham*,

20 Wash. 184, 55 Pac. 36, is in harmony with and lends support to this conclusion.

The claim of the Kriell-French Piano Company, we think, rests upon even a weaker foundation than that of the First National Bank of Crestline. There is not in the record before us any evidence of any assignment by Benjamin F. Springer of his interest in the property inherited from his brother, other than the reference to some such supposed assignment of money in the power of attorney above quoted. Plainly, under the authorities, this does not constitute a conveyance or incumbrance of real property, and even if it referred to real property instead of money, it would not estop Benjamin F. Springer from denying the existence of any such conveyance or incumbrance, since it is immaterial to the essential purpose of the power of attorney. 16 Cyc. 701.

The judgment rendered by the trial court determining the respective priorities of the liens of appellants and respondent seems to give respondent a lien upon all of the property, both real and personal, of Benjamin F. Springer inherited from his brother, a very small part of which appears to be personal property. So construing the decree, it would be manifestly erroneous in so far as it awarded respondent a lien upon the personal property, since its attachment and judgment lien is upon the real property alone. Reading the record as a whole, we are led to believe that this is a mere inadvertence in the form of the judgment. Counsel for the respective parties, while mentioning the fact that there is a small amount of personal property, seem to have overlooked that fact in the preparation of the decree, as the court also must have done in its signing of the decree.

We conclude that the judgment of the superior court, determining in effect that respondent has a superior lien upon the real property inherited by Benjamin F. Springer from his deceased brother, should be affirmed, and that the decree should be deemed amended so as to limit the lien to such real



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property. It is so ordered. Respondent will recover its costs in this court.

While we hold that the power of attorney executed by Benjamin F. Springer did not create an incumbrance upon the real property as against the attachment and judgment lien of Stultz Brothers, upon the theory that it was wholly ineffectual as an incumbrance, we do not mean to hold in this case that the decree of distribution awarding the First National Bank of Crestline and the Kriell-French Piano Company a lien upon both the real and personal property is not binding upon Benjamin F. Springer. If the trial court was in error to this extent in rendering its decree of distribution, as our views above expressed may seem to argue, it is not an error with which we are here concerned.

ELLIS, C. J., MOUNT, FULLERTON, and HOLCOMB, JJ., concur.

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[No. 14296. *En Banc*. August 6, 1917.]

THE STATE OF WASHINGTON, *on the Relation of N. W.*  
*Huggins et al., Respondents*, v. ROBERT BRIDGES  
*et al., Appellants*.<sup>1</sup>

MUNICIPAL CORPORATIONS—PORT DISTRICTS — POWERS — OPERATING RAILWAYS—STATUTES—RAIL AND WATER TRANSFER AND TERMINAL FACILITIES. Rem. Code, §§ 8165-1 and 8165-4, creating port districts as municipal corporations, and authorizing them to construct, acquire, maintain and operate, sea walls, wharves, docks, ferries, and locks "and other harbor improvements, rail and water transfer and terminal facilities" does not include a belt railway line to be operated by the port as a common carrier; since the power is not expressly granted, or fairly implied or incidental or essential to the powers granted, which from the tenor of the whole act, indicate the quoted words were intended to apply simply to means for the transshipment of commodities between water carriers and land carriers.

Appeal from a judgment of the superior court for King county, Jurey, J., entered July 9, 1917, in favor of the

<sup>1</sup>Reported in 166 Pac. 780.

plaintiffs, upon overruling demurrers to the complaints, in an action for an injunction. Affirmed.

*C. J. France*, for appellants.

*Carkeek & McDonald, F. M. Dudley, F. V. Brown, and Bogle, Graves, Merritt & Bogle*, for respondents.

HOLCOMB, J. — On November 3, 1915, the Seattle Port Commission adopted a resolution which provided for the construction and operation of a belt line railway to be known as Unit No. 14, which was submitted to the voters of the Seattle port district and ratified by them on December 4, 1915. At the same time that the above mentioned resolution was submitted, a further resolution providing for bond issues with which to secure money to build Unit No. 14, which had also been passed by the commissioners of the port district, was submitted to the voters of the district, and at the same election at which the resolution to build the belt line railway was ratified, the proposition to bond was rejected. On March 7, 1917, there was again referred to the voters of the district the question of the issuance of bonds for the belt railway line, which again failed to carry. On May 23, 1917, the port commission, by resolution, provided for the creation of a belt line railway fund to be made up of various revenues, for the purpose of building the belt line railway. On June 30, 1917, the port commission, by resolution, provided for the building of the line. This action was then brought by respondents to enjoin the construction of the proposed belt line railway, and later an intervening complaint was filed by J. W. Clise. Demurrers were filed to each of the complaints, which were overruled. The appellants declined to plead further, and judgment was rendered in accordance with the prayer of the complaint and the intervening complaint.

In 1914, 1915, and 1917, certain ordinances were enacted by the city of Seattle, granting to the port commission the right to construct a belt line railway in the city. These ordinances were all accepted by the port commission. (Ordinances Nos. 33,253, 35,432, 37,442).

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The complaints allege that the port commission has no authority to build any belt railway line, has no authority to create a belt railway line fund, and has no authority to accept the ordinances which it has accepted from the city council of Seattle; and the complaint in intervention avers there is no need for any such belt railway line, by reason of the fact that the city council of Seattle, on July 2, 1917, passed an ordinance granting franchises to other railroads in the city for the construction of a belt railway line, so that there will be no necessity for the port commission to build such a railway.

It was admitted by appellants at the trial below that the franchises granted by the city to the port commission are for the purpose of authorizing the construction of railway tracks by the commission as a common carrier, with power to fix, charge and receive rates for switching, transferring, and carrying freight to and from various industrial plants, warehouses, piers, docks, and terminals within the port district. It is also admitted that the franchises granted to the port commission are not only for the purpose of enabling the port commission to connect up its own units by a railway, but are intended to permit the port commission, as a common carrier, to run an independent switching belt railway line of its own.

Respondents maintain that the port commission is without power to construct or operate railways as a common carrier. This proposition is controverted by appellants, and that is the only question for solution in this case.

The port commission, under the statute creating it, is expressly declared to be a municipal corporation of the state of Washington. Laws 1911, p. 414, § 3; Laws 1913, p. 204, § 2 (Rem. Code, § 8165-3).

The question of the power granted such creatures of the statute must be examined critically, carefully and strictly, and not with a disposition to strain the grant to find the power.

"It is a well settled rule of construction that a delegation of powers will not be presumed in favor of a municipal corporation unless they be such as are necessary to its corporate existence, but that the same must be clearly conferred by express statutory enactment." *Tacoma Gas & Elec. Light Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655.

"It is a general and undisputed proposition of law that a *municipal corporation possesses and can exercise the following powers, and no others*: First, those granted in *express* words; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied." 1 Dillon, *Municipal Corporations* (4th ed.), § 89.

See, also, 1 McQuillin, *Municipal Corporations*, § 353. The principle to be applied, therefore, is that a doubtful power is a power denied.

The question to be determined then is, in exact terms: Do the legislative enactments in relation to the proposed project, in express terms or by clear implication beyond a reasonable doubt, grant to the port districts the powers to construct railways and operate the same as a common carrier and to assume and perform the obligations required by the Seattle ordinances granting these franchises; or are such powers indispensable to the declared objects and purposes of the district?

Chapter 92, Laws 1911, page 412, in the title to the act declared itself:

"An act authorizing the establishment of port districts; providing for the acquirement, construction, maintenance, operation, development and regulation of a system of harbor improvements and rail and water transfer and terminal facilities within such districts, and providing the method of payment therefor."

Section 1 provides:

"Port districts for the acquirement, construction, maintenance, operations, development and regulation of a system

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of harbor improvements and rail and water transfer and terminal facilities within such districts, are hereby authorized to be established in the various counties of this state, as in this act provided." Rem. Code, § 8165-1.

Appellants assert that the title to the above act contains two main thoughts: (1) The owning, maintenance and operation of a system of harbor improvements; (2) the owning, maintenance and operation of rail and water transfer and terminal facilities. Counsel for appellants very ably argue their contentions and present a very resourceful and interesting brief in support thereof. Statements of several writers and experts, as to port terminals and municipal planning with regard to what are necessary and what are facilitative of the efficiency of port terminals, have been quoted at large in the briefs. These statements of such writers and experts, while doubtless true, do not assist us in determining the question of the municipal power. That, as said before, must be determined from the legislative intent alone.

The only provisions in the act suggestive of railways, or suggestive that the legislature had rail transportation in mind at all, is the phrase "rail and water transfer and terminal facilities," a phrase occurring three times in the act—in the title, in § 1, and in § 4, where, among other powers, the port districts are authorized "to lay out, construct, condemn, purchase, acquire, add to, maintain, conduct and operate any and all systems of seawalls, jetties, wharves, docks, ferries, canals, locks, tidal basins and other harbor improvements, rail and water transfer and terminal facilities within such port district" (Rem. Code, § 8165-4). In each provision the language is the same—"rail and water transfer and terminal facilities." We look in vain for any grant of power by the legislature to the port commission to operate a railway or to carry on a transportation business or act as a common carrier, except the operation of ferries, which is expressly granted, and that limited system of carriage or transportation designated by the word "transfer," which signifies to the ordi-

nary mind, and therefore to the court, the idea of transshipment from rail carrier to water carrier and vice versa. The projected line is certainly a railway, not merely a transfer switch, and designed to serve numerous industrial plants, docks, piers and terminals.

We look in vain throughout the act, and various amendatory acts passed subsequently, for any authority conferred upon the port commission to fix, charge and receive rates for railway carriage or for any other transportation than ferry transportation. It is given the express power, by the amendment of 1913, to fix absolutely and without right of appeal or review the rates of wharfage, dockage, warehousing and port and terminal charges upon all improvements owned and operated directly by the port itself, and ferry charges of ferries operated by itself; and to fix, subject to state regulation, rates of wharfage, dockage, warehousing and all necessary port and wharf charges upon all docks, wharves, warehouses, quays, or piers owned by said port district but operated under lease from it. Laws 1913, p. 210, § 4 (Rem. Code, § 8165-4).

Railway switching or transportation rates are not named. From this it would seem obvious that the legislature did not intend that the port commission should enter upon the business of constructing, operating, and maintaining railways as common carrier lines of transportation. Nor do we think that the power granted is capable of the separation in construing it asserted by appellants. Manifestly, it seems to us, the entire language of the title to the act creating the port districts, and all of §§ 1 and 3 granting power thereto, contain but one thought, and that is that such municipal corporations should have power to acquire, construct, maintain, operate, develop, and regulate a system of harbor improvements, with such rail and water transfer and terminal facilities within such port district harbor improvements as may be necessary for the operation thereof. The powers granted are interdependent and not separate, except as to ferries. The sepa-

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ration of the powers granted into, (1) the owning, maintenance and operation of a system of harbor improvements, and (2) the owning, maintenance and operation of rail and water transfer and terminal facilities, seems to us to do violence to the plain intendments of the language and to grant a power by inference, viz., the power of operating railways not expressly granted by the legislation and clearly not to be implied.

We are asked by appellants to define what is meant by the words "rail and water transfer and terminal facilities." It might be answered that it is sufficient to determine what powers are granted this municipal corporation by the clear intendment of the act or by necessary inference, and that nowhere is it granted the power to construct, operate and maintain railway lines, either terminal, belt, or otherwise, and to act as such a common carrier. But we conceive that the language referred to simply means such adjuncts and appurtenances as are necessary or convenient for the transshipment of commodities between land carriers and water carriers. Such facilities may include a spur track or switch to a dock, pier, or warehouse, and they may include the connecting track between two docks or piers or warehouses of the port commission, for its convenience. If we construe the language as contended for by appellants, instead of reading rail *and* water transfer and terminal facilities, it should be read rail *or* water transfer, etc. When the legislature has used precise words and used words which subsequent portions of the act and amendments thereto imply were the exact words meant to be used by the law-making power, it is not the business of the court to substitute words, even such a small word as "or" for "and." Black, Interpretation of Laws (2d ed.), p. 231.

We are convinced, therefore, that the appellants have not been granted the power proposed to be exercised by them. The judgment is affirmed.

ELLIS, C. J., MOUNT, MAIN, MORRIS, FULLERTON, CHADWICK, and PARKER, JJ., concur.

[No. 13671. Department One. August 7, 1917.]

**M. O. JAMES *et al.*, Appellants, v. H. W. LUEDERS *et al.*,  
Respondents.<sup>1</sup>**

**FRAUDS, STATUTE OF—EXECUTED CONTRACTS—VALIDITY.** Where, pursuant to an oral agreement, decedent executed a deed in consideration of care and support and a note and mortgage executed by the grantees, and the contract was fully executed, and the papers delivered to an attorney, with instructions to deliver the deed to the grantees and the note and mortgage to his executors after his death, the transaction was not void under the statute of frauds.

**DEEDS—CONSIDERATION.** A deed in consideration of support is not affected by the fact that the consideration is large and that friendship entered into it.

**DEEDS—DELIVERY—REVOCATION.** A deed, to be delivered after death, is not revoked by a subsequent will, on the theory that it was in the nature of a testamentary devise, where it was the result of an enforceable contract.

**ESTOPPEL—INCONSISTENT CLAIMS.** A claim filed against an estate for care and support of the deceased will not defeat the claimant's right to receive a deed, given by the deceased in consideration of such care and support, where the claim was not filed until notice that the beneficiaries under the will would contest the deed.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered March 10, 1916, in favor of the defendants, in an action to recover possession of a deed, tried to the court. Reversed.

*Bates, Peer & Peterson*, for appellants.

*H. W. Lueders and Scott & Campbell*, for respondents.

MAIN, J.—By this action the plaintiffs sought to recover possession of a deed to real estate. The trial in the superior court resulted in a judgment in favor of the defendants. From this judgment, the plaintiffs appeal.

The facts are substantially these: For some years prior to the month of October, 1913, August Thomas and wife

<sup>1</sup>Reported in 166 Pac. 772.



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owned lots 24 and 25, in block 18, Smith and Fife's addition to the city of Tacoma, and upon these lots had been erected a dwelling house which the owners occupied. Sometime during the month of October in the year mentioned, Mrs. Thomas died. A short time thereafter, Mr. Thomas requested M. O. James and wife, the appellants, to become tenants of his home and take care of the same. Soon thereafter the appellants moved to the property, agreeing to pay therefor a stipulated rental. Thomas stored some of his furniture in one room in the house, and for a few weeks after this lived with the appellants, then went away on a trip to British Columbia and Spokane. After returning from Spokane, he made his home with the appellants for a period of five or six weeks, when, owing to rapidly failing health, on the advice of his physicians, he went to southern California. After going to California, his health continued to fail, and during the early part of May he concluded to return to Tacoma and make his home with the appellants. From California to Tacoma he was accompanied by one C. M. Strieb, a friend of many years' standing. He said to Strieb that he desired to return to Tacoma in order that he might receive better care than he was receiving in California, and that he might die in the same house in which his wife had died. They arrived in Tacoma on the 10th day of May, 1914, and M. O. James met them at the depot with a taxicab. This was in accordance with a request which he had received by wire. From the depot, Thomas was taken to the home occupied by the appellants, and there remained until his death, which occurred on the 15th day of June following. His health continued to fail rapidly and he had abandoned, apparently, all hope of recovery from the illness from which he was then suffering.

On or about the 19th of May, he caused H. W. Lueders, a practicing lawyer in Tacoma, who had been his attorney for many years, to prepare a deed, note and mortgage. By the deed, the property above described was conveyed to the appellants. The mortgage covered the same property and, to-

gether with the note in the sum of \$1,000 which it secured, was executed by the appellants. The papers were executed in a room in the house occupied by the parties, the attorney being the only one, other than Thomas and the appellants, who was present. After the appellants had executed the note and mortgage, they were passed across the table, at which those present were sitting, to Thomas, who delivered the note and mortgage and the deed to Lueders, with direction that he retain the same until his (Thomas') death, and that then the deed be delivered to the appellants and the note and mortgage to the executors of his estate, at this time making the statement that, if he recovered, the papers were to be returned to the parties who had respectively executed the same. On the 25th day of May, Thomas again sent for his attorney and discussed with him the making of a will, with the result that, on the 1st day of June, a will was executed. Thomas owned a substantial amount of property other than that described in the deed and mortgage mentioned. A few days after the death of Thomas, the appellant M. O. James called upon Lueders, who was then attorney for the executors, and requested that the deed be delivered to him. He was then informed that the legatees and devisees under the will objected to the delivery of the deed and were going to wage a lawsuit for the purpose of preventing its delivery. Sometime thereafter the present action was instituted for the possession of the deed, making the custodian thereof, as well as the beneficiaries under the will, parties defendant.

The evidence in the case clearly shows that the execution of the papers above mentioned was the result of an agreement between Thomas and the appellants. The only inference that can be drawn from the testimony is that, by the terms of this agreement, the appellants were to execute the note and mortgage and deliver the same to Thomas—which they had done—and that they should take care of him until his death. The consideration for the deed was the note and mortgage and the care, including board and room, which he had received from

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them prior to the time of going to California, and which he expected to receive from the time the papers were executed until his death. As already stated, he made his home with the appellants prior to the time of his going to California, taking some of his meals with them and some at hotels or restaurants in the city. In saying that the only inference fairly deducible from the testimony as to the terms of the agreement is that stated, we have not taken into consideration any testimony given by the appellants bearing upon the transaction with the deceased person. The attorney, who was the only disinterested party present at the time the papers were executed, testified that he understood the taking care of Thomas was "one of the things that induced him to make this deed." Two other witnesses gave testimony of similar import, one the friend who accompanied him from California, and the other an officer of the bank in which he kept an account. It thus appears that, while the agreement was originally oral, its effect had been embodied in the writings, and when Thomas died, it had become fully executed, because the appellants had done everything that they were required to do under the terms thereof. The transaction was not void under the statute of frauds.

The property was worth approximately \$4,500, the value on that basis, after deducting the mortgage, being \$3,500. This may seem a large compensation for the services rendered by the appellants, but Thomas had a right to measure the value of those services at whatever figure he saw fit. It may be, and is doubtless true, that friendship as well as the fact that Thomas died without issue, entered into the matter; but this would not defeat an agreement which had become executed by performance on one side.

The cases of *Nichols v. Opperman*, 6 Wash. 618, 34 Pac. 162, and *Brewer v. Cropp*, 10 Wash. 136, 38 Pac. 866, are distinguishable because in those cases there was neither performance nor part performance which would make the statute of frauds inapplicable.

Relative to the contention that the delivery of the deed was in the nature of a testamentary devise and therefore was revoked by the subsequent will, this may be said: While the statement of facts recites that the will was offered in evidence, neither the will itself nor a copy thereof is embodied in the record brought to this court. However, the fact that we are not advised as to the contents of the will is immaterial, because if the deed was the result of an enforceable agreement, as we have found, it would not be overcome by the execution of a subsequent will. Whether the deed and the will were so proximately connected that they would operate as one transaction and be construed together, we need not here determine.

After a most careful consideration of the record, it is plain to us that a failure to sustain the transaction and require the delivery of the deed to the appellants would be a wrong to both the dead and the living. To the dead, because it would defeat the manifest and obvious intention of the deceased. To the living, because it would deny their right to property to which they are justly entitled.

It is true that the appellants filed a claim against the estate for the care and attention which they had rendered the deceased after his return from California. This claim, however, was filed after they had been advised by the attorney for the executors that the beneficiaries under the will would contest the deed. Not knowing, of course, the result of such litigation, the appellants might, in the exercise of reason and caution, file a claim in order that, if they were defeated in the litigation over the deed, they might recover something for their trouble and expense. Under such circumstances, we think it should not be held that the filing of the claim would defeat the right to the deed.

The judgment will be reversed, and the cause remanded with direction to the superior court to enter a judgment directing the custodian of the deed to deliver the same to the appellants.

ELLIS, C. J., CHADWICK, and MORRIS, JJ., concur.

[No. 14238. Department Two. August 7, 1917.]

THE STATE OF WASHINGTON, *on the Relation of Mutual  
Union Insurance Company, Plaintiff*, v. H. O. FISHBACK,  
*State Insurance Commissioner, Respondent.*<sup>1</sup>

INSURANCE—REGULATION—POWERS OF COMMISSIONER—DISCRETION—REVIEW—MANDAMUS. Under Rem. Code, § 6059-86, providing for permits to mutual insurance companies to write other classes of insurance, upon furnishing additional assets, if the "plans, terms, and conditions prescribed and adopted" be "found to be efficient and adequate" to meet its obligations, "of which the commissioner shall be the judge," mandamus will not lie to compel the insurance commissioner to issue a permit for fidelity and surety insurance, where the record fails to disclose what showing was made as to the efficiency and adequacy of its plans, etc., the only showing being as to the additional assets; since it cannot be determined that the commissioner's refusal was arbitrary or capricious; and in any event, he could only be compelled to exercise his discretion.

Application filed in the supreme court May 28, 1917, for a writ of mandamus to compel the state insurance commissioner to issue relator a license to write insurance. Denied.

*W. R. Crawford* and *Morris B. Sachs*, for relator.

*The Attorney General* and *Frank P. Christensen*, Assistant, for respondent.

PARKER, J.—This is an original application in this court for a writ of mandate to compel H. O. Fishback, as state insurance commissioner, to issue to relator, the Mutual Union Insurance Company, a license certificate authorizing it to write "fidelity and surety insurance" as defined in Rem. Code, § 6059-83, subd. 5. Relator is a duly organized domestic insurance company. It alleges in its application for the writ that,

"The object for which this company was formed is to transact insurance against death, dismemberment and loss of sight, resulting from general accident; and also to do a lia-

<sup>1</sup>Reported in 166 Pac. 799.

bility insurance, being all insurance against loss and damage, resulting from accident to or injury, fatal or non-fatal, suffered by an employe or other person for which the insured is liable; and also to do a motor vehicle insurance business; and to do a fidelity and surety insurance, limited however, to giving surety bonds for and on behalf of members and policy holders in the company."

These, we assume, are the powers of the relator as set forth in its articles of incorporation. It is conceded that, in so far as its organization and the enumeration of powers in its articles of incorporation are concerned, relator can lawfully write fidelity and surety insurance. The question here for determination is: Has the relator the right to the issuance of a writ of mandate out of this court to compel the commissioner to issue to it a license authorizing it to write fidelity and surety insurance, upon the theory that this court can say, as a matter of law, that relator has complied with all the requirements of law entitling it to write such insurance, and that the withholding of a license therefor by the commissioner is such an arbitrary and capricious action on his part as to call for interference by this court.

Before noticing what relator has done looking to the acquisition of a license to write fidelity and surety insurance, let us briefly review the requirements of the statute in that regard, referring to the insurance code as found in Rem. Code. Section 6059-83 classifies the several kinds of insurance. Of these classes the following are all we are here concerned with: Class 4, being accident insurance; class 5, being fidelity and surety insurance; class 6, being liability insurance; and class 13½, being motor vehicle insurance. No insurance company can procure a license to write insurance of either of these classes without possessing a certain amount of assets. Upon proper showing in that regard, the commissioner is authorized to issue to an insurance company a license authorizing it to write insurance of one or more of the classes specified in § 6059-83, according as such com-

pany may show itself financially qualified so to do. These qualifications and the classes of insurance specified in § 6059-83 relate generally to stock insurance companies, and are to be referred to for the purpose of determining the qualifications of mutual insurance companies only when such companies seek license to write insurance of a class other than the kind of insurance such companies are specially authorized to write as mutual insurance companies. Section 6059-86 provides for the incorporation of mutual insurance companies and prescribes their qualifications for writing the particular kinds of insurance specified in that section, classes 4, 5, 6 and 13½ not being therein specified, which qualifications are different from those of other insurance companies. It is by complying with the provisions of that section relating especially to mutual insurance companies that such companies can procure license certificates to write the particular kinds of insurance specified therein. That section concludes as follows:

“Such company may make insurance in any other class specified in said section 6059-83 when permitted by the commissioner upon furnishing additional assets of the kind herein specified in the amounts required of a stock insurance company to make insurance in like classes as provided by this act.

“The plan, terms, and conditions prescribed and adopted by such company must be such as the experience of similar companies has found to be efficient and adequate to promptly and equitably pay and discharge its obligations and successfully conduct its business, of which the commissioner shall be the judge.”

Thus it becomes plain that mutual insurance companies must not only have the prescribed financial qualifications to write insurance of classes 4, 5, 6 and 13½, as other insurance companies, but they must have other qualifications “*of which the commissioner shall be the judge.*”

On May 15, 1917, relator applied to the commissioner for licenses authorizing it to write insurance of classes 4, 5, 6

and 13½, and made showing of its assets which it claimed were sufficient to entitle it to such licenses. The commissioner, being satisfied that relator's showing was sufficient to authorize it to write insurance of classes 4, 6 and 13½, issued to it a license certificate accordingly, but refused to issue it a license to write insurance of class 5, to wit, fidelity and surety insurance. Thereupon relator requested the commissioner to cancel its authority to write insurance of classes 6 and 13½ and to issue a license authorizing it to write insurance of class 5.

It is contended by counsel for relator that, since the commissioner determined that it was qualified to write insurance of classes 6 and 13½, it necessarily follows that it would be qualified to write insurance of class 5 upon cancellation of its authority to write insurance of classes 6 and 13½. The showing here made by relator touching its qualification relates only to the amount of its assets as a whole. No showing is made of its plan of insurance as to class 5, and we have seen that this is something to be shown the commissioner in addition to the showing to be made by companies other than mutual ones, and also that the sufficiency of this additional showing is a matter "of which the commissioner shall be the judge." It seems plain to us that these considerations constitute a complete answer to the contention of counsel for relator. Manifestly we cannot determine by the record before us as to whether or not the action of the commissioner in refusing the license certificate applied for was arbitrary or capricious.

But supposing that the showing here made were such that we could say the commissioner acted arbitrarily or capriciously, it would seem that we could do no more than decide that he should proceed to exercise his discretion. We are unable to see how we could even then lawfully control his discretion.

The writ is denied.

ELLIS, C. J., FULLERTON, MOUNT, and HOLCOMB, JJ.,  
concur.



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[No. 14300. *En Banc*. August 9, 1917.]

THE STATE OF WASHINGTON, *on the Relation of I. M. Howell,*  
*Secretary of State, Plaintiff,* v. THE SUPERIOR COURT  
FOR THURSTON COUNTY, *D. F. Wright, Judge,*  
*Respondent.*<sup>1</sup>

STATUTES—INITIATIVE AND REFERENDUM—FILING OF ADDITIONAL PETITIONS—CANVASS OF NAMES. Notwithstanding that Const., art. 2, § 1, as amended, providing for the initiative and referendum, and the act passed to facilitate the same, Rem. Code, §§ 4971-11 to 4971-18, use the word "petition" in the singular number, in requiring a referendum petition, circulated among the voters, to be filed with the secretary of state, the law does not require that the petition must be physically one petition, as that would be impossible; and the filing of a petition consisting of a number of sheets or petitions by a proponent does not constitute such a final submission of a petition as to preclude the filing of additional petitions relating to the same referendum, within the ninety days limited by the constitution; and on the filing of such additional petitions, the secretary of state must canvass the signatures upon the petitions theretofore filed, to determine whether the proposed referendum has the requisite number of signatures of legal voters; and it is immaterial that Id., § 4971-12 authorizes the secretary of state to refuse to file a petition unless it appears to bear the requisite number of signatures, that § 4971-11, requires a statement of expenses with the filing of each petition, that § 4971-14 refers to the detaching of sheets for convenience in canvassing, and that by § 4971-13, the secretary of state may destroy petitions not containing the requisite number of signatures; as the act must be liberally construed to facilitate the language and spirit of the constitution (ELLIS, C. J., MORRIS, and MAIN, JJ., dissenting).

Certiorari to review a judgment of the superior court for Thurston county, D. F. Wright, J., entered July 9, 1917, granting a writ of mandamus requiring the secretary of state to file referendum petitions and canvass the names signed thereto, after a trial to the court. Affirmed.

*The Attorney General* and *L. L. Thompson, Assistant*, for relator.

*Frank C. Owings*, for respondent.

<sup>1</sup>Reported in 166 Pac. 1126.

PARKER, J.—The relator, I. M. Howell, as secretary of state, has caused to be brought to this court by writ of review, and seeks reversal of, a judgment of the superior court for Thurston county awarding a writ of mandate requiring him to file referendum petitions and canvass the names signed thereto. The facts are not in dispute and may be summarized as follows: During the session of the legislature of 1917, there was passed, and thereafter, on February 19, approved by the governor, an act restricting importation, sale, use, and possession of intoxicating liquors, amending initiative measure No. 3, enacted by the people of the state in the year 1914. Laws of 1917, p. 46. On February 20, one E. M. Williams filed in the office of the secretary of state papers in due form evidencing his demand and proposal to have ordered by petition the referring of the above mentioned act of February 19 to the people. On March 1, the *Attorney General* formulated a ballot title for the act as a referendum measure. Upon the ballot title being so formulated, the proponent, Williams, caused to be printed in due form blank petitions for circulation among the voters of the state. These petitions were signed by a large number of persons claiming to be legal voters. On June 4, the proponent, Williams, submitted to the secretary of state for filing a large number of these signed petitions attached as one petition. The secretary received and filed these petitions and commenced his canvass looking to the final determination of the number of properly authenticated signatures of legal voters signed thereto. On June 6, the proponent, Williams, submitted to the secretary for filing several additional petitions, exactly like those submitted on June 4 except as to the signatures. There were on these additional petitions three hundred and ninety signatures purporting to be those of legal voters.

When the additional petitions were submitted to the secretary he had not completed the canvass of the names signed to the previously submitted petitions, and the number of sig-

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natures of legal voters attached to the previously submitted petitions had not then been ascertained. Respondent Williams alleges that, if it should appear that there are not a sufficient number of signatures of legal voters attached to the petitions submitted on June 4 to call for the referring to the people of the act of February 19, there will be more than a sufficient number of signatures for that purpose counting the signatures of legal voters upon the petitions submitted on June 4 with those upon the petitions submitted on June 6. The secretary refused to receive and file these additional petitions and canvass the signatures thereon in connection with the signatures upon the petitions submitted on June 4. Thereupon respondent Williams sought, in the superior court of Thurston county, a writ of mandate requiring the secretary to receive and file these additional petitions and canvass the signatures thereon together with the signatures upon the petitions submitted on June 4. Trial in the superior court resulted in judgment awarding a writ of mandate as prayed for. It is the reversal of this judgment which is here sought.

Our problem is this: When the proponent of a referendum measure has filed with the secretary a petition consisting of a number of sheets or petitions such as the law prescribes, does such filing constitute the final submission of such petition in the sense that no additional petitions relating to the same referendum can be filed in behalf of the original proponent or of the signers of such filed petition within the ninety days prescribed by our constitution for the filing of referendum petitions, and the original proponent or the signers of the filed petition have the right to have signatures upon such additional petitions canvassed in connection with the signatures upon the filed petitions. Or, stated conversely, have the signers of such additional petitions the right to have the signatures upon such previously filed petitions canvassed in connection with the signatures upon the additional petitions.

Section 1, art. 2, of our constitution as amended, providing for the initiative and referendum, reads in part as follows:

“Referendum petitions against measures passed by the legislature shall be filed with the secretary of state not later than ninety days after the final adjournment of the session of the legislature which passed the measure on which the referendum is demanded. . . . This section is self-executing, but legislation may be enacted especially to facilitate its operation.” Amendment 7, subd. d.

While this section of the constitution provides generally for the initiative and referendum and purports to be self-executing, it would seem somewhat difficult to render it effective without legislation. . So, in compliance therewith, the legislature of 1913 passed an act facilitating the operation of the initiative and referendum. Laws of 1913, p. 418. That act, after providing for the filing with the secretary of state, by a legal voter or committee or organization of voters, of a demand or proposal for the referring to the people of an act passed by the legislature, the formulating by the *Attorney General* of a ballot title for such referendum measure and the form of petitions to be circulated, provides in part as follows:

“Sec. 11. When the person, committee or organization proposing any such initiative measure or demanding any such referendum . . . shall have secured upon any such referendum petition the signatures of thirty thousand legal voters, or the signatures of legal voters equal in number to or exceeding six per centum of the whole number of electors who voted for governor at the regular gubernatorial election last preceding, he or they may submit said petition to the secretary of state for filing in his office. At the time of submitting such petition the person, committee or organization, submitting the same shall file with the secretary of state a full, true and detailed statement giving the names and post office addresses of all persons, corporations and organizations who have contributed any monies to aid in the preparation, publication and advertising of the measure and the preparation,

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circulation and filing of the petition, with the amount contributed by each, and a full, true and detailed statement of all expenditures, giving the amounts expended, the purpose for which expended, and the names and post office addresses of the persons and corporations to whom paid, which statement shall be verified by the affidavit of the person or some member of the committee or organization in charge of the measure, and until such statement is filed the secretary of state shall refuse to receive such petition." Laws 1913, p. 424, § 11 (Rem. Code, § 4971-11).

"Sec. 12. The secretary of state upon any such petition being submitted to him for filing shall examine the same, and if upon examination said petition appear to be in proper form and to bear the requisite number of signatures of legal voters, . . . if said petition be a referendum petition ordering and directing that the whole or some part or parts of a bill passed by the legislature be referred to the people for their approval or rejection at the next ensuing general election or a special election ordered by the legislature, and such petition is submitted for filing not more than ninety days after the final adjournment of the session of the legislature which passed the bill, the secretary of state shall accept and file said petition in his office; . . ." Rem. Code, § 4971-12.

Section 13 provides for an appeal to the superior court of Thurston county from a preliminary decision of the secretary of state refusing to file a petition, and

"In case no appeal is taken from the refusal of the secretary of state to file said petitions within the time prescribed, or in case an appeal is taken and the secretary of state is not required to file said petitions by the mandate of either the superior or the supreme court, the secretary of state shall destroy said petitions." Id., § 4971-13.

"Sec. 14. If the secretary of state accept and file any such initiative or referendum petition upon its being submitted for filing or if he be required to file the same by the court he shall forthwith, in the presence of the governor, or, if the governor be absent, in the presence of some other state officer and in the presence of the persons submitting such petition for filing, if such persons desire to be present, detach the sheets containing the signatures and certificates and cause them all to be firmly attached to one or more printed

copies of the proposed initiative or referendum measure in such volumes as will be most convenient for canvassing and filing, and shall number such volumes and file the same and stamp on each thereof the date of filing." Id., § 4971-14.

Sections 15, 16 and 17 (Id., §§ 4971-15 to 4971-17) provide for the canvassing by the secretary of the signatures upon the filed petitions with a view of finally determining the sufficiency of the number of legal voters signing the same to call for the referendum of the act in question, and for appeal from the decision of the secretary by any citizen who shall be dissatisfied with his determination that there is not a sufficient number of signatures of legal voters upon the petitions to call for the referendum of the act. Section 18 (Id., § 4971-18) provides that the secretary shall canvass and count the names on the petition within thirty days after its filing. Neither the constitution nor the facilitating act provides in terms for the filing of the additional petitions.

Counsel for the secretary contend that, because the facilitating act does not in terms authorize the filing of additional petitions, and because the constitution and facilitating act both use the word "petition" in the singular number when referring to the filing in the office of the secretary, the filing of the petitions on June 4 constituted a final submission by the proponent, and all the signers of those petitions, of the question of whether or not there shall be a referendum of the act, even though the ninety days prescribed by our constitution for the filing of such petitions had not expired. Now, if we were dealing only with the rights of Williams as the proponent of the referendum of this act, it might be said that *he* finally submitted his case to the secretary without recall and without the right of filing additional petitions, upon the filing of the petitions by him on June 4. But even that could result only from a very strict construction of the constitution and facilitating act. We are to remember, however, that we are not dealing with the rights of Williams alone, but with the rights of the several thousand other persons whose

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names are signed to all these petitions. Indeed, his rights are no greater than those of each of the other several thousand signers, both of the petitions submitted on June 4 and the petitions submitted on June 6. Are all these petitioners, signing petitions exactly alike, asking for the referring to the people of this same act, their petitions all being submitted for filing with the secretary within the ninety days prescribed by the constitution for the filing of referendum petitions, to be denied the right to have their petitions all considered as one petition, and their signatures thereto all counted and canvassed as signatures to one petition, simply because they did not cause all their physically separate petitions to be attached together and offered for filing to the secretary at the same moment? We think to answer this question in the affirmative would do violence to the spirit of the constitution. Nor do we think the facilitating act calls for any such interpretation. Only the strictest construction of the constitution and of that act could lead to such a conclusion.

Counsel for the secretary concede that it is not necessary for all the signatures to be attached to a paper constituting one physical petition as it is circulated among the voters, as manifestly that would be impossible; though the constitution uses the word "petition" in the singular number. Yet they argue that all the signatures must be upon petitions physically attached to each other before being submitted for filing to the secretary; that is, that the petition must then be physically one petition. It is true that the secretary is not required to file any petition until "upon examination said petition appear . . . to bear the requisite number of signatures of legal voters;" this manifestly contemplating only a tentative examination, and not an examination for the purpose of finally determining the sufficiency of the number of signatures of legal voters to the petition to call for a referendum. But we think it does not follow that, after a petition has been received and filed by the secretary, it is his

duty or privilege to refuse to file additional petitions of exactly the same form with other signatures thereon asking for the same referendum, and refuse to count and canvass the names thereon together with the names on petitions already received and filed by him, when such additional petitions are submitted for filing within ninety days following the adjournment of the legislature, as these additional petitions were submitted for filing. We think the submitted additional petitions and the previously filed petitions then became, in legal effect, one petition.

We do not view this problem as one analogous to amendatory or supplemental pleadings, as counsel for the secretary seem to do. It appears to us to be more analogous to the bringing of additional interested parties into a cause where the rights of such additional parties are not impaired by any statute of limitation, and where the rights of such additional parties rest upon the same facts as do the rights of the original parties. Suppose that the proponent, Williams, had withheld from filing the petitions he submitted to the secretary on June 4, and submitted those petitions together with those submitted on June 6. Manifestly the secretary would not have been warranted in rejecting such petitions, it being conceded by him that the petitions as a whole appear to bear the requisite number of signatures of legal voters to call for the referendum. Again we ask, is it possible that the several thousand signers of these petitions, both those signing the petitions submitted on June 4 and those signing the petitions submitted on June 6, shall be deprived of the right to have all their signatures counted and canvassed as signers of one petition, which we think it is in legal effect, simply because one of their number, to wit, the proponent, Williams, happened to submit to the secretary a number of signed petitions attached together as one petition before the time for filing such petitions had expired? We find nothing in the constitution or law, nor upon the face of any of the petitions, making Williams, as the original proponent of the ref-

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erendum, agent for any of the signers of the petitions, in the sense that he was authorized to file any number of petitions he might elect as one petition and thereby finally submit the case of the signers of such petitions, and of all others who desired to sign such petitions, to the secretary for final determination as to the sufficiency of the number of legal voters asking for the referendum, before the expiration of the ninety days following the adjournment of the legislature. To hold that Williams was such an agent would in effect defeat the right of all the signers of petitions exactly alike, asking for the same referendum, submitted within the ninety days prescribed by our constitution, to have canvassed as upon one petition all the names signed to such petitions. We think this right of the signers of petitions which are separate only in a physical sense is not to be defeated by the mere fact of their petitions being submitted at different times, when all are submitted within ninety days following the adjournment of the legislature passing the act sought to be referred to the people. In other words, we think such physically separate petitions constitute one petition submitted as of the date of the submission of the last one. Any other view, we think, would do violence to the spirit of the constitution.

Whatever divergence of opinion there may be among the courts touching the meaning of constitutional or statutory provisions relating to the initiative and referendum, we think it safe to say that all courts that have spoken upon the subject agree that such provisions are to be liberally construed, to the end that these popular legislative rights of the people reserved in the several constitutions where found may be preserved and rendered effective. In *State ex rel. Case v. Superior Court*, 81 Wash. 623, 143 Pac. 461, Ann. Cas. 1916B 838, we said:

“It is worthy of note, and that we keep in mind as we proceed, that these initiative and referendum provisions of our

constitution are all embodied in one section, which contains these words: "This section is self-executing, but legislation may be enacted especially to facilitate its operation." It was in compliance with this language that the legislature passed the act of 1913, the material portions of which we have above reviewed, declaring, in the title of that act, that it is 'to facilitate the operation of the provisions of § 1 of art. 2 of the constitution relating to the initiative and referendum.' Thus there is strongly suggested, in the language of the constitution and this law, a required liberal construction, to the end that this constitutional right of the people may be *facilitated*, and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right."

While three of the judges dissented from the conclusion reached by the majority in that case, none dissented from this view. Manifestly there is nothing in our conclusion here reached that will in the least impair the effectiveness of the facilitating act in so far as it looks to the prevention of fraud and mistake in the exercise by the people of this constitutional right.

There are in the facilitating act four provisions which it is claimed argue against our conclusion. The argument that our conclusion is out of harmony with the provisions of § 12 (Id., § 4971-12) above quoted, authorizing the secretary to refuse to file a petition unless it appear to bear the requisite number of signatures, we think is answered by our observations already made.

It is further argued that our conclusion is out of harmony with the provision of § 11 (Id., § 4971-11) above quoted, requiring the filing with the petitions of detailed statements of expenditures incident to the procuring of signatures to petitions and promoting or bringing about a referendum. It is conceded that this was done upon the filing of these petitions. We see no reason why this cannot be done each time petitions are filed within the ninety days following the adjournment of the legislature, and the fact that the secretary must require

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the filing of such an account before receiving petitions manifestly does not prevent him from requiring it each time petitions are filed.

It is further argued that our conclusion is not in harmony with the provision of § 14 (Id., § 4971-14) above quoted, relating to the detaching of the sheets containing the signatures and attaching them to one or more printed copies of the petitions and measure and binding them in volumes for the convenience of canvassing upon the filing of the petitions. Like the matter of filing the statement of expenditures mentioned, we see no reason why this may not be done at the time each filing is made within the ninety days following the adjournment of the legislature.

It is further argued that our conclusion is out of harmony with the provision of § 13 (Id., § 4971-13) above quoted, authorizing the secretary of state to destroy the petitions which are submitted to him and found upon his preliminary examination not to contain the requisite number of signatures to call for a referendum. Counsel seem to assume that this has reference to the destruction of petitions found to be insufficient by reason of lack of sufficient number of signatures of legal voters after the secretary has finally determined such insufficiency. But we think it has no reference to the destruction of petitions which are received and filed by him. Therefore, when these additional petitions were tendered for filing with the secretary, there were in his possession the petitions filed on June 4, for the purpose of final determination by him of the question of the sufficiency of the number of signatures obtained to call for a referendum. When the additional petitions were submitted for filing on June 6, it was in effect a demand for the filing of such additional petitions, and a refiling (if necessary) as of that date of the petitions submitted on June 4, and for the consideration of all the petitions *as one petition*. This, we think, the proponent Williams, or any other signer of any of the petitions, had the right to have done.

We conclude that both the language and the spirit of the constitution and the facilitating act call for an affirmance of the judgment of the superior court. The decision of the supreme court of Arkansas in *Hammett v. Hodges*, 104 Ark. 510, 149 S. W. 667, deals with a problem much like that here involved, wherein the views in that court are expressed quite in harmony with our conclusion here reached.

The judgment is affirmed.

MOUNT, HOLCOMB, FULLERTON, and CHADWICK, JJ., concur.

MORRIS, J. (dissenting)—I am unable to concur in the majority view, and briefly state my reasons.

The sufficiency of the petition is to be determined by the constitution and facilitating act, neither of which permits the filing of additional or supplemental petitions. I agree that as many petitions may be filed as there are persons desiring to file them, but the plain construction of both constitution and statute is that each petition must be complete in itself. When Williams filed his first petition, his rights were exhausted. If the petition thus filed was defective or wanting in any requirement, petitions subsequently filed by himself or others cannot be tacked onto the first petition to cure or amend its defects. The facilitating act must be read as a whole in the light of the orderly procedure it purposed to effect. When so read, its provisions plainly place no duty upon the secretary of state to file any petition until upon examination it appears to meet the requirements of the facilitating act as to the requisite number of signatures of legal voters. The secretary of state is not required to examine every paper filed in his office to ascertain whether in the aggregate they contain the necessary number of names. He is to examine that, and that only, which under the statute is filed as a petition, and when so filed and so examined, his duty is at an end.

There being no duty imposed by the law, it follows that the decree cannot compel the secretary of state to act. An

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enlargement of these views might make my position plainer. As here stated they will, however, be sufficient to indicate my reasons for dissent.

ELLIS, C. J., and MAIN, J., concur with MORRIS, J.

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[No. 13767. Department Two. August 11, 1917.]

OTTO E. HUBENTHAL, *Appellant*, v. SPOKANE & INLAND EMPIRE RAILROAD COMPANY, *Respondent*.<sup>1</sup>

RAILROADS—CROSSING ACCIDENTS—NEGLIGENCE—EVIDENCE — SUFFICIENCY. It is negligence to run an electric train through a deep cut onto a much used crossing, where the view from the road was obstructed, at 50 miles per hour, without any warning except a faint whistle the instant before reaching the crossing.

SAME—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The contributory negligence of the driver of an automobile, struck by an electric train at a crossing, is for the jury, where the crossing was in a deep cut, he approached the tracks at about one mile per hour, looking all the time for an approaching train, but owing to obstruction of the view, it was impossible for him to see the train, approaching at high speed, until the front end of the automobile was about six inches from the rail, when an attempt to reverse and back up would have been more hazardous than to attempt to cross.

SAME—CROSSING ACCIDENT—LAST CLEAR CHANCE. The doctrine of last clear chance has no application, where, if there was contributory negligence, it continued up to the instant of the collision; nor where there was no contributory negligence, as the rule presupposes the existence of contributory negligence.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered March 27, 1916, upon granting a nonsuit, dismissing an action for damages to an automobile through a collision with an electric train. Reversed.

*Roche & Onstine*, for appellant.

*Graves, Kizer & Graves*, for respondent.

<sup>1</sup>Reported in 166 Pac. 797.

ELLIS, C. J.—In this action plaintiff sought to recover damages for the destruction of his automobile through a collision with one of defendant's trains at the crossing at Willow Springs station on defendant's electric railway line.

Plaintiff's evidence shows that, at the point in question, the railway track runs from north to south, approaching the crossing at a down grade of a little over two per cent. The public highway runs from east to west, approaching the crossing at a down grade of about two and one-half per cent. The highway right of way is about forty feet wide, with the narrower traveled roadway along the middle. Immediately north of the highway right of way, the ground rises in a considerable hill or plateau, necessitating a deep cut for the railway line for some distance to the north, from which cut the railway tracks emerge approximately at the northerly boundary of the highway right of way. A switching track lies a few feet west of the main track and joins it about 175 feet north of the crossing. The space between the rails and between the two tracks immediately at the crossing is planked for a distance north and south of about 16 feet. At the time of the accident, a freight car was standing on the switch just south of the crossing, the north end extending two and one-half feet over this planked roadway. At that time, September 4, 1915, there was a thick growth of Chinese lettuce and other vegetation, four or five feet high, on top of the banks of the cut. The trial was in March, 1916, at which time this growth had disappeared. From measurements taken a few days before the trial, it appears that a man standing in the middle of the roadway at a point twenty feet east of the east rail of the main railway track could see another man for a distance of 175 feet north on the railroad; standing at a point fifteen feet east from the same rail, he could see the other man for a distance of 250 feet north; standing ten feet from the rail, he could see the other man for 400 feet north; standing eight feet from the rail, he could see the other man for only 260 feet, because of the coincidence of a line of telegraph and

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trolley wire poles with the line of vision; standing six feet from the rail, he could see up the track 660 feet. So far as the evidence shows, the only other or earlier possibility of a visual warning of the approach of a train would have been to look for the pantographs or trolley supports on top of the motor car, which it is admitted would have been visible above the bank of the cut to a traveler on the highway back for some 200 feet before his passing from behind the bank so as to have any view up the cut. How far up the track from the crossing the pantographs would have been so visible does not appear. From photographs in evidence it appears, however, that they were not so massive as to be readily discernible at any considerable distance.

Plaintiff, a farmer, resided a short distance east of the railway track and south of the highway. He left his home in his automobile at about 2:30 in the afternoon. He saw the regular train pass about ten minutes previously. He entered upon the highway a few hundred feet east of the railroad crossing and proceeded toward the crossing at a speed of about seven to ten miles an hour till the front of his car was within about fifteen feet of the east rail of the main track. He himself was about twenty feet from the track. He then reduced speed to one mile an hour or less. He said, "I was just creeping along." He testified that from there on, proceeding at this slow pace, he was looking for trains practically all the time, only turning his eyes ahead to see where he was going and avoid the car on the crossing. He neither saw nor heard any train till the front of his automobile was about six inches from the east rail of the main track, when he first saw the train, a special, coming rapidly through the cut from the north at a distance of between 100 and 175 feet. He said, "It was too late for me, at the time, to stop and reverse, in case I had trouble to shift my engine, so I proceeded on; I thought I had time to clear the track." And again, "I gave her all the juice I had and I took it in a jump." The train struck the rear end of the automobile, throwing it

against the car on the switch, wrecking the automobile and slightly injuring plaintiff. The train consisted of two cars pulled by a motor car pushing another motor car in front of it. Plaintiff and two other witnesses testified that the train was running fifty or sixty miles an hour at the time, and came to a stop about 800 or 1,000 feet south of the crossing. Plaintiff testified that he heard no whistle or bell and that the motorman told him he had no bell, that the whistle was out of order, and that he could not see ahead because the front motor obstructed his view. One witness, who at the time was a short distance east of the crossing, said he heard a very faint whistle about two seconds before the crash. Another witness said that the motorman claimed to have given all the warning necessary. So far as the evidence shows, there was no lookout in the front motor car.

At the close of plaintiff's evidence, the trial court granted a nonsuit on defendant's motion on the ground of contributory negligence, and dismissed the action. Plaintiff appealed.

Appellant contends (1) that the accident was caused solely by respondent's negligence; (2) that appellant was not guilty of contributory negligence, and (3) that, in any event, the cause should have been submitted to the jury under the rule of last clear chance.

The evidence clearly shows that respondent was guilty of negligence. To run a train through this deep cut debouching immediately upon a much used public crossing, where any adequate view of the track from the roadway was much obstructed, at anything like fifty miles an hour, with no warning save the faint sound of a whistle just an instant before reaching the crossing, was palpable negligence.

It is almost equally clear that appellant was not guilty of contributory negligence as a matter of law. It is argued that he could have looked over the elevation from the higher part of the highway and so observe the approach of the motor pantographs above the vegetation. But warning from



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that source, of course, presupposes the presence of the train in the cut at the time of observation. If the train was running at the rate of fifty or sixty miles an hour, which is the only evidence we have on the subject, it was not anywhere near the south end of the cut until plaintiff was down near the crossing moving at a snail's pace and endeavoring to look up the track itself, as he was bound in law to do. Even there, taking as true, as we must, the measurements in evidence, his view up the track was so intermittently obstructed as to make it but a chance that he would see a train moving at that speed before he was himself within six or eight feet of the crossing, when the front of his machine would be practically upon the track. In the situation detailed in evidence, we cannot agree with the trial court that, if he had looked, he must of necessity have seen the train in time to stop completely before reaching the zone of danger. The train was running down grade, making but little noise, and gave no adequate or timely signal of its approach. The evidence of the high speed of the train and of the short distance appellant could see up the track at any time before reaching it makes it extremely questionable whether the train had reached any point in the range of his vision when he was twenty, fifteen, or even ten feet from the track. Herein lies the vital distinction between this case and that of *McKinney v. Port Townsend & P. S. R. Co.*, 91 Wash. 387, 158 Pac. 107, mainly relied upon by respondent. In that case, the evidence was conclusive that the driver of the automobile had a plain view of the train when he was eighteen or twenty feet from the track and recklessly attempted to cross in front of it. Here appellant did not see the train, and probably could not have seen it, until an attempt to reverse and back the automobile would have been more hazardous than the attempt to cross. Under the evidence now before us, the question whether appellant was guilty of contributory negligence was one for the jury. *Stewart v. Northern Pac. R. Co.*, 96 Wash. 486, 165 Pac. 377.

The rule of last clear chance is not involved. If appellant

was guilty of contributory negligence, that negligence continued to the instant of collision. In such a case, respondent would be liable only in case the motorman actually saw the automobile in time to avoid the collision. There is no evidence whatever that he saw it at all. There was, therefore, nothing to relieve appellant's negligence of its contributory character. *O'Brien v. Washington Water Power Co.*, 79 Wash. 82, 139 Pac. 771. If, on the other hand, appellant was not guilty of contributory negligence, the collision was referable solely to respondent's negligence, and the rule of last clear chance, which presupposes the existence of contributory negligence, is not applicable. For a full discussion of the governing principles see *Mosso v. Stanton Co.*, 75 Wash. 220, 134 Pac. 941, and note to that case in L. R. A. 1916A 943. See, also, *McKinney v. Port Townsend & P. S. R. Co.*, *supra*, and *Nicol v. Oregon-Washington R. & Nav. Co.*, 71 Wash. 409, 128 Pac. 628, 43 L. R. A. (N. S.) 174.

The sole debatable question of fact presented by the evidence now before us is the question of contributory negligence. That, as we have seen, was a question for the jury under proper instructions.

The judgment is reversed, and the cause is remanded for a new trial.

MOUNT, PARKER, FULLERTON, and HOLCOMB, JJ., concur.

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[No. 14005. Department One. August 13, 1917.]

THE STATE OF WASHINGTON, *Respondent*, v.  
FRANK J. RICHARDS, *Appellant*.<sup>1</sup>

**THREATS—INFORMATION—SUFFICIENCY.** Under Rem. Code, § 2613, an information for blackmail is sufficient, where it charges that the accused, with intent to extort and gain \$24,000 from one T., sought to compel him to execute a lease and other papers, under threats of accusing him of certain crimes and publishing the accusations.

**SAME—NATURE AND ELEMENTS—"INTENT."** Under Rem. Code, § 2613, making the accusation of crime and certain other acts blackmail, if done with intent to extort or gain money or property, it is no defense that the accused thought that he was justly entitled to what he demanded, "intent" meaning that the purpose of the act was to extort or gain.

**SAME—EVIDENCE—INTENT—COLLATERAL MATTERS—REBUTTAL.** In a prosecution for blackmail, the testimony of the accused, on cross-examination, that he had been advised by an attorney that his acts would not be blackmail, is not upon a collateral matter and may therefore be rebutted; since it would be material on the question of intent.

**WITNESSES—PRIVILEGE—ATTORNEY AND CLIENT.** The rule of privilege respecting communications with an attorney does not extend to advice given by the attorney in contemplation of the future commission of blackmail, in which or in the avoidance of which, the client sought advice.

**CRIMINAL LAW—INSTRUCTIONS—COMMENT ON FACTS.** In a prosecution for blackmail, it is not an unlawful comment upon the evidence for the court to state that written instruments were libelous or to state the legal obligation with respect to executing legal documents, or that there was no evidence to establish a legal duty; since the interpretation of written instruments is for the court and the court may correctly define a matter of law and determine the issues to be submitted.

Appeal from a judgment of the superior court for Clallam county, Ralston, J., entered November 23, 1916, upon a trial and conviction of blackmail. Affirmed.

<sup>1</sup>Reported in 167 Pac. 47.

*L. F. Chester*, for appellant.

*Frank L. Plummer, T. F. Trumbull, and Rose & Lewis*, for respondent.

MORRIS, J.—Appellant was charged jointly with Edgar G. Mills with the crime of blackmail, and appeals from a separate trial and conviction.

The first question raised is the sufficiency of the information. The information is too long to set forth as a whole. It charges that the appellant and Edgar G. Mills, with the intent to extort and gain \$24,000 from one Thompson, unlawfully and feloniously sought to compel Thompson to execute to appellant a ninety-nine year lease of certain real property owned by Thompson and sign other valuable papers under threats of accusing Thompson of assault, blackmail, seduction, larceny and other crimes, and with publishing a certain document in which Thompson is accused of these crimes in detail.

Our statute, Rem. Code, § 2613, thus defines blackmail:

“Every person who, with intent thereby to extort or gain any money or other property or to compel or induce another to make, subscribe, execute, alter or destroy any valuable security or instrument or writing affecting or intending to affect any cause of action or defense, or any property, or to influence the action of any public officer, or to do or abet or procure any illegal or wrongful act, shall threaten directly or indirectly—(1) To accuse any person of a crime; or (2) To do any injury to any person or to any property; or (3) To publish or connive at publishing any libel; or (4) To expose or impute to any person any deformity or disgrace; or (5) To expose any secret, shall be punished, etc.”

The information was clearly sufficient even to its disgusting detail, as was the evidence to sustain the information and conviction. The publication threatened was grossly libelous. The attempt to extort money or valuable property was plain.

Appellant's main argument is addressed to three contentions: First, if appellant believed he was justly entitled

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to that which he demanded, such belief is a defense, as the act complained of would then lack the essential element of "intent thereby to extort or gain." It must be admitted that to commit the crime charged there must be an intent to extort or gain, but that does not mean that one can, by the employment of the means used in this instance, compel another to bestow upon him that which he thinks or believes he is entitled to receive. What the statute means in the use of the word "intent" is that the purpose of the act—that which the actor had in mind in doing the act—was to extort or gain, and this purpose is accomplished when, by use of the means defined in the statute, one seeks in an unlawful manner to obtain money or property from another. The statute is directed against the means used as well as the purpose sought to be accomplished. The intent is not necessarily limited to "gain," but includes "to extort," that is to gain by wrongful methods; to obtain in an unlawful manner; to compel a payment by means of threats of injury to person, property or reputation. In this sense one can commit this crime though he is of the opinion that the money thus sought is actually due him. The law does not countenance forceful and unlawful collection even of just debts, and when one uses the methods set forth in this statute to obtain money or property, he commits the crime defined in the statute, irrespective of his belief that in so doing he is only attempting to obtain that which he is entitled to receive. *State v. Logan*, 104 La. 760, 29 South. 336; *State v. Bruce*, 24 Me. 71; *Commonwealth v. Coolidge*, 128 Mass. 55; *Cohen v. State*, 37 Tex. Cr. App. 118, 38 S. W. 1005; *State v. Hollyway*, 41 Iowa 200, 20 Am. Rep. 586; *In re Sherin*, 27 S. D. 232, 130 N. W. 761, Ann. Cas. 1913D 446, 40 L. R. A. (N. S.) 801. As to the fact, there is no warrant for any such claim of right. Appellant sought to compel Thompson, first, to execute to him a ninety-nine year lease of certain real property. There is no contention that Richards had either legal or equitable interest in this property or that he ever claimed he had. Second, he

sought to compel Thompson to purchase some hotel stock at a fixed price of \$24,000. While Richards owned this stock, it having been given to him while he was acting as manager of the hotel property, he had no arrangement or agreement with Thompson whereby Thompson was in any sense obligated to purchase the stock at Richards' price, or at any other price. The appellant was given the benefit of all that he was entitled to under the law when the court instructed the jury that intent was an essential element of the crime charged and, as such, must be proved beyond reasonable doubt. In so far as rulings upon the rejection of evidence are embodied in this assignment of error, we find nothing that would indicate that appellant was deprived of presenting fairly and fully every material or relevant fact to the jury.

The next contention is error in permitting appellant's co-defendant, Mills, to testify what he said to appellant when advising with him as to whether or not what was done could be done and escape criminal liability. Mills is a lawyer, and the main point is that his testimony was the unpermitted disclosure of a privileged communication between attorney and client. Mills has not yet been tried. So far as here disclosed, his part in the affair was to consult with Richards as to whether or not the contemplated act would be blackmail, assist in the preparation of the ninety-nine year lease, and to carry the demands, threats and libelous publication, consisting of forty-five typewritten pages roughly bound together, from Seattle to Thompson's home on Lake Crescent and deliver it in person. On his cross-examination appellant was asked in regard to the brochure prepared by him and delivered by Mills: "Had you been advised as to the nature of this, whether it was blackmail or not?" No objection was made to the question, and witness answered: "If I was to gain nothing which did not belong to me I understood it would not be blackmail." He further answered that this advice had been given him by Mills. The state called Mills in rebuttal

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and, over objection of appellant, he testified: "I did advise under all the stuff that was submitted to me and under our statute, accompanied with threats especially under the libel section of the statute, that I thought it would constitute blackmail." The objections now urged are (1) that the inquiry upon cross-examination of appellant was upon a collateral matter and the plaintiff was bound by the answer of appellant in testifying to what Mills had told him. It was not a collateral matter. Whether or not the act of appellant was or was not covered by the statute on blackmail was the relevant inquiry of the trial, the purpose and the only purpose of the proceeding by the state. If appellant knew or had been advised of the legal consequence of his act such knowledge was material upon the intent with which the act was performed.

The second objection is that the conversation between Mills and appellant was a privileged communication between attorney and client. There was no privilege. The applicable rule is thus stated in 40 Cyc. 2373:

"The rule does not extend to communications respecting proposed infractions of the law, and so there is no privilege as to communications made in contemplation of the future commission of a crime, or perpetration of a fraud, in which, or in avoiding the consequences of which, the client asks the advice or assistance of the attorney. But communications in respect to an alleged crime or fraud, made after the act or transaction is finished, are privileged."

The same rule is recognized in 10 Ency. of Evidence 303. In *Hartness v. Brown*, 21 Wash. 655, 59 Pac. 491, the same contention is disposed of with this language:

"The rule, however, is well settled that communications made to counsel in contemplation of fraud or a criminal act are not privileged."

We offer no comment upon the part played by Mills in this transaction. It speaks for itself, and whoever reads this record may give it such name as he deems appropriate. The

only question we have to determine is the competency of Mills as a witness, and as the communication between appellant and Mills was in the undoubted contemplation of a criminal act, the rule of privilege does not apply.

The last assignment is directed to the instructions given, it being especially urged that the court improperly commented upon the facts. This contention is based upon certain holdings of the court embodied in the instructions, to the effect that the matter embraced within the brochure and the threat to publish was libelous; that the least which appellant demanded of Thompson was an instrument or writing intending to affect the title to property within the meaning of the statute, and that Thompson was under no obligation to execute the lease nor purchase the hotel stock as bearing upon the question as to whether or not the act charged against appellant, if committed, was, as defined by the statute, an attempt to extort or gain money or property. The interpretation to be given written instruments, whether the procedure is on the civil or criminal side of the court, is a matter of law for the court and not a matter of fact for the jury. It was not error for the court to tell the jury that the matter contained in the threatened publication was libelous, nor that the threat to publish was a threat to publish a libel. Neither was it error to comment upon the legal phase that Thompson was not bound in law to execute the lease nor purchase the stock. The court does not violate the inhibition against comment upon the facts in correctly defining a matter of law to the jury, nor in determining the issues to be submitted to the jury. All that the court said in effect to the jury was that the act of appellant, if committed, would be embraced within the definition of the statute, which is a question of law and not of fact. Neither is it a comment upon the facts for the court to state to the jury that there is no evidence to establish a legal duty, which was in effect what the court instructed the jury, when, as here, there is neither evidence nor contention that there was any such evidence. A defendant cannot be



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prejudiced by a statement made by the court upon a matter of law against the truth of which there is no contention. *Drumheller v. American Surety Co.*, 30 Wash. 530, 71 Pac. 25; *State v. McPhail*, 39 Wash. 199, 81 Pac. 683; *State v. Gohl*, 46 Wash. 408, 90 Pac. 259; *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355; *Farraris v. Slade Lumber Co.*, 88 Wash. 106, 152 Pac. 680.

Attention has been given to other assignments of error in which we find no merit.

The judgment is affirmed.

ELLIS, C. J., CHADWICK, MAIN, and PARKER, JJ., concur.

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[No. 14152. Department One. August 13, 1917.]

THE STATE OF WASHINGTON, *Respondent*, v.  
ARTHUR ALDRICK, *Appellant*.<sup>1</sup>

RAPE—EVIDENCE—COMPLAINT — ADMISSIBILITY. In a prosecution for rape, while the fact of complaints made is admissible, it is error to allow the person to whom the complaints were made to give the details and particulars of the complaint as related to him, since the same would be hearsay.

SAME—EVIDENCE—COMPLAINTS—RES GESTAE. In a prosecution for rape, details and particulars of a complaint made, narrating the occurrences of the previous evening, are not admissible as part of the *res gestae*, as it was not the utterance of instinctive words.

CRIMINAL LAW—APPEAL—HARMLESS ERROR. When there was a conflict in the testimony and a question for the jury, the reversal of a conviction cannot be denied for error in admitting illegal evidence upon the vital issue in the case, merely because guilt was overwhelmingly established by other evidence.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 24, 1916, upon a trial and conviction of rape. Reversed.

*Robertson & Miller*, for appellant.

*John B. White* and *Harry G. Kinzel*, for respondent.

<sup>1</sup>Reported in 166 Pac. 1130.

MAIN, J.—The defendant in this case was charged by information with the crime of rape, committed upon a female child under the age of fifteen years. The trial resulted in a verdict of guilty. From the judgment entered upon this verdict, the defendant appeals.

The facts, briefly stated, are these: The appellant, on the 23d day of July, 1916, was living at the home of the father of the prosecuting witness, and had been making his home there for a few months previous to that time. On the evening of the day mentioned, in the dining room of the home, at about the hour of 9:30 o'clock, the offense is claimed to have been committed. The father of the prosecuting witness was employed in a restaurant, and worked from seven o'clock in the evening until seven o'clock in the morning. An uncle of the prosecuting witness was in the house at the time in an upstairs room. Immediately after the occurrence, the appellant was arrested by two police officers, who had observed the commission of the offense through a window of the house, the dining room at the time being lighted. Two young men testified that, from a room in the adjoining house, they had observed a similar occurrence a few evenings previous. This being reported to the chief of police, the two officers mentioned were detailed upon the matter. The day following the commission of the crime, the appellant signed a written confession in the presence of two or three persons, who testified as witnesses. Upon the trial, the appellant repudiated the confession, in that he did not read it before signing, and did not know its contents.

Shortly after the occurrence, the uncle took the child to the restaurant where her father was at work, but no conversation took place between the child and the father at that time, the latter directing the uncle to take her home and saying that he would see her the next morning. The police officers, or one of them, previous to this visit, and the uncle at the time, informed the father what had taken place. On the following morning, at about 7:30 o'clock, the father re-

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turned home and had a conversation with his daughter, in which she detailed to him the particulars of the offense and what the appellant had told her as an inducement. Upon the witness stand, the father, over objection, was permitted to detail what his daughter had told him on the morning following the occurrence, and this presents the principal question here for determination. The rule is well settled in this state that the fact that the ravished person made complaint after the occurrence may be shown in evidence, either by the testimony of the complaining witness or by the person to whom the complaint was made. This rule is recognized by the appellant, but it is claimed that it does not go so far as to permit the details or particulars of the complaint to be related. As to whether such details or particulars may be offered in evidence, the authorities generally are in conflict, but this court has adopted the view that, while the complaint may be shown, the details or particulars are subject to objection. In *State v. Hunter*, 18 Wash. 670, 52 Pac. 247, the two lines of authorities are referred to and considered, and the rule is there announced that the particulars of the complaint may not be shown. It is there said:

“After a pretty thorough examination of the cases we think the better rule is to restrict the evidence to the fact of complaint, and that anything beyond that is hearsay of the most dangerous character.”

In *State v. Griffin*, 43 Wash. 591, 86 Pac. 951, the holding in that case is referred to with approval. It follows, therefore, that it was error for the trial court, in the case now under consideration, to permit the father to relate upon the witness stand the facts as his daughter had detailed them to him on the morning following the occurrence.

The state argues that this conversation between the father and the daughter was a part of the *res gestae*, and therefore admissible, but the rule permitting the fact of complaint to be shown is not based upon the theory that it is a part of the

*res gestae*, but upon the fact that it tends to confirm the testimony of the person ravished, as is pointed out in *State v. Griffin, supra*. The daughter, in her conversation with her father, narrated the occurrence of the previous evening. This was not the utterance of instinctive words. In 1 Wharton, Criminal Evidence (10th ed.), § 262, it is said:

“*Res gestae* are events speaking for themselves, through the instinctive words and acts of participants, but are not the words and acts of participants when narrating the events. What is said or done by participants under the immediate spur of a transaction becomes thus part of the transaction, because it is then the transaction that thus speaks. In such cases it is not necessary to examine as witnesses the persons who, as participators in the transaction, thus instinctively spoke or acted. What they did or said is *res gestae*; it is part of the transaction itself.”

It is said, however, that, even though it was error to permit the father to detail what his daughter had told him, it was not prejudicial, because the evidence overwhelmingly established the appellant's guilt. Even though the other evidence offered was very conclusive as establishing the guilt of the accused, this would not justify a holding that illegal evidence upon the vital issue in the case was not prejudicial to him. The appellant, testifying in his own behalf, denied his guilt. The question of fact was for the jury. This is not one of those cases where it can be said that the error was only technical, or was not prejudicial to the rights of the accused. The evidence offered and received was not admissible under the previous declaration of this court in the *Hunter* case, *supra*, and the *Griffin* case which followed it. For this error, the case must be reversed.

The appellant makes three other assignments of error, all of which relate either to the ruling of the trial court in rejecting offered testimony or limiting the scope of the cross-examination of the state's witnesses. While these objections are argued briefly, we think they do not present questions for detailed discussion. In the rulings challenged by these

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assignments, there is no reversible error. The one prejudicial error is that above indicated.

The judgment will be reversed, and the cause remanded for a new trial.

ELLIS, C. J., CHADWICK, and MORRIS, JJ., concur.

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[No. 13321. *En Banc*. August 13, 1917.]

HEWITT LOGGING COMPANY, *Respondent*, v. NORTHERN  
PACIFIC RAILWAY COMPANY, *Appellant*.<sup>1</sup>

CARRIERS—OVERCHARGES—RECOVERY—CONDITIONS PRECEDENT—LIMITATIONS—STATUTES. Rem. Code, § 8626-91, providing that all claims concerning transportation overcharges shall be filed with the public service commission within two years from the time the cause of action accrues, is an exclusive remedy to the extent that it requires a submission of the action to the public service commission within two years as a condition precedent to the right to maintain an action; and it is not unconstitutional or beyond the power of the legislature, as curtailing the common law, as declared by Const., art. 12, § 15, compelling fairness in freight charges, to provide an inquiry by a board skilled in the science, as a prerequisite to the institution of a suit and within a definite time; since there is no abolition of the remedy and no vested right in procedure.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered January 15, 1916, in favor of the plaintiff, upon overruling a demurrer to the complaint, in an action to recover money paid. Reversed.

*Geo. T. Reid, J. W. Quick, and L. B. da Ponte*, for appellant.

*Gordon & Easterday and J. E. Belcher*, for respondent.

*Higgins & Hughes (Hyman Zettler, of counsel)*, *amicus curiae*.

CHADWICK, J.—This is an action to recover for an overcharge, collected by appellant from respondent's assignor,

<sup>1</sup>Reported in 166 Pac. 1153.

for freight upon sawlogs hauled from Satsop, Washington, to Hoquiam. A greater rate was charged than for a like service given to others between Mack, Washington, and Hoquiam, a greater distance on the same line and in the same direction. The freight was hauled under the published tariffs of the road.

After a demurrer had been filed, the complaint, which alleged no more than the overcharge, was amended, appellant consenting thereto, by adding the following:

“All of which shipments were covered by appropriate bills of lading issued by defendant, which bills of lading were alike in form and one of which is hereto attached, marked Ex. C, and made a part hereof.”

The demurrer being renewed upon the grounds (1) that the complaint did not state a cause of action, and (2) that the action was not commenced within the time prescribed by law, was overruled upon both grounds. Judgment for want of an answer was entered against appellant.

Appellant relies on Rem. Code, § 8626-91, which provides that, where complaints are made to the public service commission concerning overcharges, they shall be made within two years:

“All complaints concerning overcharges shall be filed with the commission within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the court within one year from the date of the order of the commission.”

And upon Rem. Code, § 165:

“An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued.”

It is admitted that the cause of action arose more than two years, and less than six years, before the commencement of the action; the position of the appellant being that the public service commission law affords an exclusive remedy, or, if not, the action is barred under the general statute of limitations. Rem. Code, § 165.

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We find that the remedy afforded by the statute, while not in the strict sense of the term exclusive, is to the extent that it requires a submission of all controverted questions arising out of freight rates and freight charges mandatory, and that one aggrieved by an overcharge must first submit his petition to the public service commission within two years after his cause of action has accrued, as a condition precedent to the right to maintain an action, which is in form a common law action, modified only in so far as the statute touches the measure of recovery and the time within which the action may be brought.

The pertinent sections of the act of 1911, which is known as the "Public Service Commission Law," Laws 1911, ch. 117, p. 538, are as follows:

"Sec. 22. No common carrier, subject to the provisions of this act, shall charge or receive any greater compensation in the aggregate for the transportation of persons or of a like kind of property, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. . . ." Rem. Code, § 8626-22.

"Sec. 80. Complaint may be made by the commission of its own motion or by any person or corporation, . . . by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission:

"Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the person or corporation complained of, which shall be accompanied by a notice fixing the time when and place where a hearing will be had upon such complaint. The time fixed for such hearing shall not be less than ten days after the date of the service of such notice and complaint, excepting as herein provided." Id., § 8626-80.

Section 81 provides for a hearing and

"At the conclusion of such hearing the commission shall make and render findings concerning the subject-matter and

facts inquired into and enter its order based thereon. . . . A full and complete record of all proceedings had before the commission, or any member thereof, on any formal hearing had, and all testimony shall be taken down by a stenographer appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review any order of the commission, a transcript of such testimony, together with all exhibits introduced, and of the record and proceedings, in the cause, shall constitute the record of the commission." Id., § 8626-81.

"Sec. 91. When complaint has been made to the commission concerning the reasonableness of any rate, fare, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the commission, and the commission shall determine that the public service company has charged an excessive or exorbitant amount for such service, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, with interest from the date of collection.

"If the public service company does not comply with the order for the payment of the overcharge within the time limited in such order, suit may be instituted in any court of competent jurisdiction to recover the same, and in such suit the findings and order of the commission shall be *prima facie* evidence of the facts therein stated. If the complainant shall prevail in such action, he shall be allowed a reasonable attorney's fee, to be fixed and collected as part of the costs of the suit. All complaints concerning overcharges shall be filed with the commission within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the court within one year from the date of the order of the commission." Id., § 8626-91.

And §§ 104 and 111 (Rem. Code, §§ 8626-104, 8626-111), to which we shall hereafter refer.

The right to recover for discriminations in freight rates had not always been acknowledged by the courts. To save any controversy over the question of the right of a shipper who had suffered an extortion in the way of an unequal charge, or who had paid a greater charge for a short haul



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than had been charged another for a long haul, the people put in the constitution a declaration prohibiting the practice.

"Persons and property transported over any railroad . . . shall be delivered at any station . . . at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station . . . Const., art. 12, § 15.

Respondent insists that this section reaffirms the common law. Its argument logically assumes that it is beyond the power of the legislature to take from a shipper any of the remedies incident to the common law, and that it can assert its right to recover in an action upon the bill of lading which is a contract bringing the limitation for such actions within Rem. Code, § 157, which provides for a limitation of six years on—

"(2) An action upon a contract in writing, or liability express or implied arising out of a written agreement;"

But we think that such conclusion does not follow.

To avoid unjust discrimination, unlawful rebates, and favoritism theretofore prevailing, the several states, as well as the Congress of the United States, have adopted regulatory statutes. In *State ex rel. Oregon R. & Nav. Co. v. Railroad Commission*, 52 Wash. 17, 100 Pac. 179, the then commission law was attacked because it had provided a procedure then unknown to the law and procedure prevailing in the courts and quasi judicial tribunals of the country. In passing upon the objection, it was said:

"It is true that the forms of law and procedure under which the commission is acting are not in all respects like the forms and procedure governing other courts; and in the language of many of the cases cited by the counsel for appellant, and repeated by the appellants themselves in their arguments, in some respects 'it is not a proceeding under the forms and with the machinery provided by the wisdom of successive ages.' But it occurs to us that it makes no difference whether it is a proceeding under the forms and with the machinery provided by the wisdom of successive ages, or

whether it is under the powers and proceedings provided by this age. Law is a progressive science, and must necessarily regard the changing conditions of society and of the business of the country, and the legislature and courts of today ought certainly to be as well qualified to provide machinery for the guidance of a commission as was the law-making power two hundred years ago. The essential idea does not take cognizance of the antiquity of the powers and machinery under which the commission is acting, but of the question whether, under such powers and the working of such machinery, the respective legal rights of the carriers and the people are preserved. A careful examination of the whole act, we think, refutes the statements made by the attorneys for appellant that the law is cunningly devised for the purpose of preventing railroads from obtaining just judgments, and repels the presumption that the commission provided for by the legislature is appointed for the purpose of oppressing railroad companies. We think, on the contrary, the presumption must be that the commission will act with fairness towards all parties."

No better statement of the spirit, purpose, and object of such laws has ever been written.

We may grant that the constitution declares the common law, but it does not follow that the legislature may not occupy its acknowledged field and define procedures and fix limitations upon the assertion of the right preserved. The "Public Service Commission Law" does not assume to take away the common law right of action. The legislature has accepted the declaration of the constitution at its full worth and has, by a complete statute, endeavored to avoid all of the annoyances and collateral questions attending the assertion of the common law remedy, such as the reasonableness of the rate in and of itself, and its reasonableness when compared to another rate, the character and extent of service, the attending circumstances, and the measure of recovery, which it is said was never defined at common law (*Pennsylvania R. Co. v. International Coal Co.*, 230 U. S. 184), and which it is said with equal gravity was as certain as a re-

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covery can be upon an implied contract to pay money. *Sullivan v. Minneapolis & R. R. Co.*, 121 Minn. 488, 142 N. W. 8, 45 L. R. A. (N. S.) 612.

To define procedure, to make a condition precedent, and to fix a limitation does not destroy the force of the constitution. On the contrary, a law so providing makes it efficient, certain, and uniform in its operation. The substantive right remains; that is all the citizen can insist upon, for it is held under authority without limit that no litigant has a vested right in procedure so long as his right of action is not abolished.

In the Minnesota case, *supra*, the court held that the public service commission law of that state was not exclusive, and that the common law right as well as common law remedies were not repealed by it. The court reminded itself of the rule as laid down by Chief Justice White in *Texas & Pac. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 437:

"We concede that we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words render its provisions nugatory."

And proceeded to hold that, whereas the act did not provide a civil remedy, the shipper might pursue his common law remedy independent of the statute. But here the procedure is not repugnant to, but is in aid of, the common law right. The statute exempts itself from the rule of the Minnesota case by providing in terms:

"If the public service company does not comply with the order for the payment of the overcharge within the time limited in such order, suit may be instituted in any court of competent jurisdiction to recover the same, . . ."  
Laws 1911, ch. 117, p. 600, § 91 (Rem. Code, § 8626-91).

To say that it is beyond the power of the legislature to provide for an inquiry by a board skilled in the technical science of freight and passenger rates as a prerequisite to the institution of a suit, and within a definite time, would be to assert the indefensible principle that the legislature could not pass any law of procedure where a right of action existed at common law.

That the legislature intended to save all substantive rights is made plain by the act itself. Section 104 provides:

“This act shall not have the effect to release or waive any right of action by the state or any person for any right, penalty or forfeiture which may have arisen or may hereafter arise under any law of this state; . . .” Rem. Code, § 8626-104.

And § 111 evidences the legislative intent that all actions brought after the passage of the act should be governed by the terms of the act in so far as it defined procedure. Section 111 (Id., § 8626-111) saves only pending actions, while § 104 saves all substantive rights then accrued or thereafter to accrue.

The object of the law was to fix a certain procedure applicable to all cases and to avoid the confusion that would follow a holding for appellant, that is, two limitations upon one cause of action—a limitation of two years and one thereafter, if a petition were filed with the commission, and one of six years if respondent's theory be accepted.

Not much has been said by the court upon the subject of freight rates and common law remedies, but all that has been said is consistent with the principle now asserted. *State ex rel. Oregon R. & Nav. Co. v. Railroad Commission*, *supra*; *State ex rel. Goss v. Metaline Falls Light & Water Co.*, 80 Wash. 652, 141 Pac. 1142. Goss and wife petitioned the court for a writ of mandamus to compel a public service corporation to furnish their place of business with water at a rate alleged to be the customary rate for like service to others. A demurrer was interposed and sustained

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upon the ground that the public service commission had exclusive jurisdiction to entertain the petition in the first instance. The ruling of the court was sustained. That to so provide by statute, was not considered by the court as a denial of remedy, for it said:

“A careful examination of this act will disclose a legislative intention to invest the public service commission with exclusive original jurisdiction to hear, pass upon and determine the questions here presented. The public service commission, as constituted, is authorized to examine in the first instance and pass upon these problems. Appellants should seek their remedy before that tribunal.”

The case of *Northern Pac. R. Co. v. Carstens Packing Co.*, 92 Wash. 243, 158 Pac. 721, is relied on. That case arose under a rule of the interstate commerce commission upon a subject resting in rule and regulation as distinguished from right and remedy, and throws no light upon the present controversy.

Respondent contends that the court has held in *Lilly Co. v. Northern Pac. R. Co.*, 64 Wash. 589, 117 Pac. 401, that the court has jurisdiction to entertain a suit independent of the statute. That case is readily distinguished and, when properly understood, does not impinge any of our present conclusions. The court there dealt with the right of the parties as they were defined by the interstate commerce law. The jurisdiction of the courts to entertain a suit to recover illegal discriminations in freight rates without first resorting to the interstate commerce commission was sustained upon, and by reference to, the twenty-second section of the act to regulate commerce.

“Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.” U. S. Comp. Stats. 1901, pp. 3170, 3171.

The act to regulate commerce preserves existing rights and remedies; the public service commission law preserves

rights but not remedies, except as to cases then pending. Laws 1911, ch. 117, pp. 609, 611, §§ 104, 111 (Rem. Code, §§ 8626-104, 8626-111).

If the common law be the growth of the ages, it follows that it must grow with the ages. The common law is not an inflexible code, but a comprehensive enumeration of principles sufficiently elastic to meet the social development of the people. It is in a state of "constant improvement and development in keeping with advancing civilization and new conditions of society." Holmes, Common Law, pp. 1-5, 36 *et seq.*

It was the boast of the common law that it afforded a remedy for every wrong. Its remedies were not always adequate. Sometimes, because of changing conditions, they become burdensome. This was the evident condition when the problems of transportation first engaged the attention of the courts. To repeat, the people wisely asserted the common law right to compel fairness of freight charges in their constitution, and left it to the legislature to define a procedure that would, while preserving the right, make recovery certain in amount and tend to reduce the volume of litigation. In so doing, it worked no hardship on any one by making provision that a claim should be filed with the commission and within a certain time, it being nowhere asserted that the time limited is unreasonable.

The claim for the overcharge was not made by respondent's assignor within the time fixed by law. The condition precedent to the right to sue is nonexistent. The complaint does not state a cause of action.

Reversed, and remanded with directions to dismiss.

ELLIS, C. J., HOLCOMB, MORRIS, MOUNT, MAIN, FULLERTON, and PARKER, JJ., concur.

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[No. 13963. Department Two. August 14, 1917.]

THE STATE OF WASHINGTON, *Respondent*, v. HENRY E.  
DOTSON, *Appellant*.<sup>1</sup>

**BURGLARY—EVIDENCE—IDENTIFICATION.** In a prosecution for burglary, a general identification of the accused, as, in witness' best belief, the man who had been seen with a stolen car, is sufficient without proof of particular marks or peculiarity.

**BURGLARY—EVIDENCE—SUFFICIENCY.** A conviction of burglary is sustained by evidence that a garage was broken open and a car stolen therefrom on the night of defendant's arrival at the place, that the car was tracked to and abandoned at S. early the next morning, after a hard trip, having stopped enroute at a garage, and the accused was identified as the man who had driven it there, and that he left S. that day, having in his possession a number of automobile keys for different makes of cars.

**CRIMINAL LAW—EVIDENCE—ADMISSIBILITY.** In a prosecution for burglary of a garage and stealing a car, it is admissible, as part of the circumstantial evidence, to introduce the license plates found on the car which had been changed to prevent identification; the clothing worn by the accused, for the purpose of comparison to aid a witness in identifying accused as the driver of the car; and keys of various automobiles, found in the possession of the accused, in the nature of criminal tools and implements constituting a suspicious circumstance.

Appeal from a judgment of the superior court for Skagit county, Brawley, J., entered July 8, 1916, upon a trial and conviction of burglary. Affirmed.

*Flick & Frater* and *Coleman & Gable*, for appellant.

*A. R. Hilen* and *R. V. Welts*, for respondent.

HOLCOMB, J.—The first and second complaints of appellant of the judgment against him are that the evidence was insufficient to justify the verdict of guilty, and that the trial court erred in refusing to direct a verdict in his favor.

Appellant was charged with having, in Skagit county, Washington, on April 19, 1916, wilfully, unlawfully, and

<sup>1</sup>Reported in 166 Pac. 769.

feloniously broken and entered a building, to wit, a barn and garage, wherein property, to wit, an automobile, was at the time kept for use and deposit, with intent to commit a crime therein, to wit, the taking of an automobile and motor vehicle without the permission of the owner, the barn and garage at the time being the property of another, to wit, one E. G. English.

The evidence was chiefly circumstantial. There was evidence that the automobile was in the garage on the night in question; that the garage was locked; that the lock was broken, the door opened, and the car removed therefrom during the nighttime without the knowledge of the owner. This sufficed *prima facie* to prove a burglary by some one. It was further shown, that the garage was situated in Mount Vernon, and that appellant, a fireman employed by the Great Northern Railroad Company, traveled from Seattle on the evening of April 19 on an employee's pass of that railroad, upon which he obtained passage from Seattle to Bellingham, but left the train at Mount Vernon at about 8:35 p. m. The car which was taken was a Studebaker-Six. It had on it at the time three non-skid and one smooth-case tire. The smooth-case tire was on the right front wheel. The loss of the car was discovered early in the morning of April 20. The owner and an officer started in pursuit of it immediately and, as there had been a rain that night and the car could easily be tracked by its tires, they tracked it and found that it stopped at a place on the Pacific highway called Sylvana, and at a garage at that place. They tracked it continuously into Seattle, and on the morning of the 20th, it was found in Seattle, abandoned at the road side and showing all evidences of a hard trip. On the morning of April 20, at a very early hour, before daylight, a person driving a Studebaker-Six stopped at the garage in Sylvana, awakened the keeper, and procured gasoline. On the morning of the 20th, appellant presented himself at the Great Northern depot in Seattle, and took a train leaving there at eight a. m. for Bel-



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lingham. When arrested, appellant had in his possession a number of automobile keys for different makes of automobiles. After arrest, upon being taken to Sylvana, the keeper of the garage where the Studebaker-Six had stopped on the night of April 20 immediately recognized and identified appellant as the man who had driven it.

I. Appellant insists that the identification by the keeper of the garage was not definite and positive. We think it was. It was not necessary for him to identify any particular mark or peculiarity of the man. It is sufficient if he was able to identify him generally as, in his best belief, the man who had been there with the car on the night in question.

Appellant also insists that these circumstantial facts fall far short of proving that appellant is the man who broke and entered the garage; that mere possession of the property taken is not proof of the breaking and entering.

"It is seldom that burglary can be proved by the direct and positive evidence of witnesses who have knowledge of the actual breaking and entry. The inference of guilt in most instances has necessarily to be drawn from other facts satisfactorily proved. The sufficiency of the evidence in any case belongs exclusively to the jury; the competency of the evidence is to be determined by the court." 4 R. C. L., p. 442, § 37.

"Every essential element of the offense charged must be proved, and it must be shown beyond a reasonable doubt that the offense was committed by the defendant. The evidence, however, need not be direct. Circumstantial evidence is sufficient if it excludes, beyond a reasonable doubt, every other hypothesis except that of the defendant's guilt." 6 Cyc. 240-241.

See, also, *State v. Norris*, 27 Wash. 453, 67 Pac. 983.

Possession of the recently stolen property taken by a burglar is a circumstance which, if unexplained, tends to establish the crime and fix the guilt.

Tested by these rules, we are satisfied that the circumstances were such that, if the jury believed the evidence

thereof, every link in the chain necessary to connect defendant with the crime charged and prove the commission of the crime was shown. Hence there was sufficient evidence to establish the commission of the offense and to connect the appellant with it and to justify the verdict; and consequently the court could not direct a verdict in favor of the appellant.

II. The third error claimed by appellant is upon the admission of evidence, excepted to at the time and referring to three things: (1) The introduction of certain license plates found on the car which had been taken; (2) improper identification of clothing worn by appellant and improper admission of the same into evidence; and (3) improper admission into evidence of the keys taken from the person of appellant. As to the license plates found upon the stolen car, they were found at the time it was discovered in Seattle and they were not the plates which belonged to the car. They were properly introduced in evidence and were material to show the condition of the car when found, and that the license plates belonging on the car had been changed in order, manifestly, to prevent identification of the car. They were material parts of the circumstantial evidence in the case. The garments introduced in evidence were identified by an officer as the hat and coat worn by appellant when he was brought back from Seattle. They were introduced for the purpose of comparison by the keeper of the garage where the man with the Studebaker-Six stopped in the early morning of April 20, and were a part of the circumstantial evidence connected with the identification of the man. They were properly received. The keys were also proper and competent evidence as tending to show that appellant was in possession of the keys with which he could make use of several different kinds of automobiles, were in the nature of criminal tools or implements, and constituted a suspicious circumstance. Such evidence is always admissible. 6 Cyc. 239; *Commonwealth v. Williams*, 2 Cush. (Mass.) 582.

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Syllabus.

III. The determination of the preceding questions in effect disposes of appellant's assignment on the refusal of the trial court to grant his motion to set aside the verdict.

IV. The fifth and sixth claims of error relate to discussion of stricken testimony in the argument of counsel for the state and the refusal of the court to instruct the jury to disregard the same. An examination of the record discloses that the prosecuting attorney made no reference in argument to the stricken testimony, and that his argument related solely to testimony as to which no motion had been made and no ruling by the court thereon. The testimony referred to by him was proper, relevant, and competent evidence.

There is no error. Affirmed.

ELLIS, C. J., MOUNT, FULLERTON, and PARKER, JJ., concur.

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[No. 14040. Department Two. August 14, 1917.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK V.  
ARNOLD, *Appellant*.<sup>1</sup>

CRIMINAL LAW—EVIDENCE—REBUTTAL. Where a witness had admitted animus against the accused, it is not error to exclude evidence of the accused to show the relations between them, where it did not show a different or greater bias or any contradiction of the witness.

CRIMINAL LAW—ALIBI—INSTRUCTIONS. Where the accused offered testimony that he was elsewhere when the crime was committed, it is proper to instruct, upon the defense of alibi, that it was necessary for the accused to show that, at the very time of the commission of the crime, he was at another place, so far away that he could not, with ordinary exertion, have been at the place where the crime was committed.

CRIMINAL LAW—NEW TRIAL—DISCRETION. The denial of a new trial for newly discovered evidence will not be disturbed in the absence of abuse of discretion, where the affidavits were controverted and a question of fact presented to the trial judge.

<sup>1</sup>Reported in 166 Pac. 777.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered August 31, 1916, upon a trial and conviction of robbery. Affirmed.

*McMaster, Hall & Drowley* and *H. W. Arnold*, for appellant.

HOLCOMB, J.—I. The first error urged to reverse the judgment of conviction is that the court erred in not permitting appellant to tell, in testifying, of the relations between him and a witness for the state named Fisher. Fisher had testified to the effect that appellant and his brother were not at the place where they claimed in evidence they were, on the evening and at the time of the robbery. This was, of course, important and a very material fact which was in sharp dispute. It is contended that, if the witness Fisher had animus towards appellant because of trouble between them, the jury should have been informed thereof by evidence, so that they might consider the testimony of Fisher in the light of that feeling; and that the partiality of a witness, whether of friendship toward one or animosity toward the other party, may always be shown as bearing upon credibility. 40 Cyc. 2656.

The witness Fisher did not, however, deny that, during the eleven months previous, he had had some feeling against appellant. It is claimed that his admissions were equivocal, reluctant, and qualified. He answered that he had had trouble with appellant, but "not much"; that he "was sore at appellant, but not particular." Appellant was questioned, to rebut the foregoing, and asked whether or not the relations during about the year preceding, with Fisher, had been friendly. Upon objection, answer to this was excluded. Fisher having admitted his unfriendliness during that period approximately, the appellant's answer could not have but corroborated Fisher on that general question, to be of avail to him, and could not be rebuttal. Appellant was then asked whether or not in the early part of February of the preced-

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ing year, on Fisher's place, an altercation occurred between him and Fisher, as a result of which appellant was ordered off the place and ordered never to go upon the place again. This testimony, it is asserted, tends to show a degree of hostility towards appellant by Fisher at variance with his admissions and in contradiction of his qualifications as to his feelings. We cannot so construe it. The mere fact of Fisher ordering appellant off his premises and warning him never to return thereon is no proof of a greater degree of animosity on Fisher's part than he admitted. The details of the quarrel or the merits of the controversy between them could not be admitted or considered, as appellant concedes. The result of the controversy was admitted by the witness himself so far as animus was concerned, and appellant offered nothing tending to show a different or greater bias or any contradiction of the witness.

II. The court instructed the jury:

"One of the defenses interposed by the defendant in this case is an alibi; that is, that the defendant was at another place at the identical time that the crime was committed, if committed at all. You are instructed that the defense of an alibi, to be entitled to consideration, must be such as to show that, at the very time of the commission of the crime charged, the accused was at another place, so far away or under such circumstances that he could not, with an ordinary exertion, have been at the place where the alleged crime was committed."

Appellant maintains that, if this instruction is correct, he never offered the defense of alibi; that, although he did claim that, during all of the time of the evening of July 4, 1915, from 8 p. m. until some time after midnight, he was on a gasoline launch on the Columbia river with his brother, fishing, the alleged robbery occurring at about 11:10 o'clock p. m., he did not at any time claim that, "at the very time of the commission of the crime charged, he was at another place, so far away or under such circumstances that he could not, with ordinary exertion, have been at the place

where the alleged crime was committed"; that he did not contend that he could not, with ordinary exertion, have been at the place where the alleged crime was committed; that his contention and his evidence was that he was not at the place where the robbery was alleged to have been committed; not that he could not have been there. It is argued, therefore, that the effect of stating to the jury that appellant made the defense that he was at a place from which he could not, with ordinary exertion, have reached the place of the crime, when no evidence offered by him tended to sustain such a defense, was as though the jury had been told that he claimed a thing which he had not been able to prove. This argument is specious. There could have been no other object of appellant's evidence than to establish an alibi. There was evidence for the state that the mooring place of appellant's gasoline launch was about 200 yards from the place of the alleged crime. There was testimony that the launch was moored there all the evening from eight o'clock to at least 11:15 o'clock, or at least was seen there at five different times up to that, the last time it was seen, during that period. That being the case, the appellant having interposed the defense of showing his whereabouts during all the evening in question, the state and the jury were not concluded by his testimony as to that fact, and it became a material circumstance to consider whether or not he could, with ordinary exertion, have had his boat at its regular mooring place at about the time of the commission of the robbery, and have, with ordinary exertion, reached the place of the robbery at the time alleged, and committed the crime. We have held that, in such case, the charge to the jury should be that they should consider as a circumstance whether or not the accused was not so far away from the place where the offense was committed that he could not have reached it; and this is the almost unanimous rule of law. *State v. Burton*, 27 Wash. 528, 67 Pac. 1097; 12 Cyc. 619, 620. The instruction was correct and appropriate to the case.

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III. It is contended that the court erred in refusing appellant a new trial. The motion was based upon the several statutory grounds, including that of newly discovered evidence. This ground was supported by affidavits tending to show the discovery of a witness named Gard and that he would give testimony in complete contradiction of the witness Fisher. These affidavits were controverted by affidavits filed by the state and affidavits showing that Gard had made contradictory statements, and tending to show that he would have testified contradictorily to the statements made by him to a number of affiants immediately after the commission of the crime. This presents a question of fact for the trial court to determine. Since he was presumably more or less familiar with the affiants and their credibility, we cannot say that he abused his discretion in resolving that question against appellant. Indeed, from a perusal of the various affidavits, on their face we should feel inclined to the same conclusion as that of the trial judge.

We find no error. Affirmed.

ELLIS, C. J., MOUNT, FULLERTON, and PARKER, JJ.,  
concur.

[No. 14044. Department One. August 14, 1917.]

J. L. LARSON, *Respondent*, v. GEORGE B. DEERING *et al.*,  
*Appellants*.<sup>1</sup>

**PRINCIPAL AND SURETY—OFFICIAL BOND—JUDGMENT AGAINST PRINCIPAL.** A judgment against a sheriff for a wrongful levy is not conclusive upon the sureties upon his official bond conditioned merely for the faithful discharge of the sheriff's duties, but is no more than *prima facie* of the merits in a subsequent case against the sureties, casting the burden of proof upon them.

**SAME—ACTIONS—OFFICIAL BONDS—DEFENSES OF SURETY.** In an action upon a sheriff's official bond to collect a judgment recovered against the sheriff for a wrongful levy, the sureties' answer setting up the lawfulness of the sheriff's acts states a good defense as to the sureties.

Appeal from a judgment of the superior court for King county, Smith, J., entered September 25, 1916, upon findings in favor of the plaintiff, in an action on an official bond, tried to the court. Reversed.

*C. B. White* and *W. P. Bell* (*Bogle, Graves, Merritt & Bogle*, of counsel), for appellants.

*Jay C. Allen* (*Ernest R. Wilkins*, of counsel), for respondent.

CHADWICK, J.—Appellant Deering was the sheriff of Snohomish county. Appellant surety company was surety upon his official bond. Respondent Larson's assignor obtained a judgment against Deering as sheriff for damages by reason of a wrongful levy. The surety company was not joined as a party to the action. The judgment being unsatisfied, respondent brought this action against Deering and the surety company, setting up the official character of Deering, his bond and the obligation of the surety company, which is in the language of the statute (Rem. Code, §§ 3985, 8325), binding the principal to "faithfully discharge all the duties

<sup>1</sup>Reported in 166 Pac. 1119.



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of his said office according to any law now in force, or which shall hereinafter be enacted," the judgment, and the fact that it has not been paid, and prayed for judgment in the sum previously adjudged to be due from Deering, with interest and costs. Defendants (appellants) demurred to this complaint upon the grounds that the court had no jurisdiction over the person of Deering; that the court had no jurisdiction over the subject-matter; and that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled. Exceptions were taken by each of the appellants. Deering stood upon his demurrer. The surety company answered, admitting the official character of Deering and the giving of the bond, but denied that the bond was legally effective to bind it to the payment of the judgment. Further answering, the surety company set up, by way of affirmative defense, that Deering had been without fault in the act complained of in the original suit; that the property levied upon had been regularly seized and sold as provided in the statutes; that he had fully accounted for the proceeds of the sale; that Deering had not defended the original action in good faith, and carelessly, negligently, and in fraud of the rights of the surety company had allowed a judgment to be obtained; that the judgment was obtained through a mistake of facts, and contrary to the facts that should have been proven and the law governing; that Deering fraudulently, carelessly, and negligently failed and refused to appeal from said judgment; that it was not given notice of the pendency of the action, and had no notice or opportunity to defend, and had no notice of the judgment until the commencement of this present proceeding.

A demurrer to the affirmative answer was interposed and sustained. Appellant surety company stood upon its answer. The case went to trial. The judgment roll in the action against Deering was offered, the assignment of the judgment was proved, and after a motion for nonsuit had

been overruled, judgment was entered in favor of the respondent.

It will be seen that the legal effect of the court's rulings upon the demurrer and the entry of the judgment is to bind a surety on an official bond to the payment of the judgment, upon formal proof of a judgment theretofore entered against the principal, and without notice to the surety.

Counsel for respondent admit, as text writers affirm, that the authorities are irreconcilably in conflict, but barring a very few cases, the conflict is more apparent than real. There are cases holding that a judgment against a principal on his official bond is no evidence at all against the surety unless the bond upon its face contains a stipulation that the surety will be bound by a judgment rendered against the principal. It was so held in *Pico v. Webster*, 14 Cal. 202, 73 Am. Dec. 647, but it will be noticed that the court drew a distinction between an engagement to pay in any event and an engagement to answer for the faithful performance of official duty. This case, as well as others fashioned in the same form, really turns upon the wording of the bond.

So, too, there are cases holding that the judgment against the principal is conclusive upon the sureties although the sureties were not made parties to the suit and had no notice of it. This doctrine has never been applied in all its vigor outside of the state of Pennsylvania, and it is upon *Masser v. Strickland*, 17 Serg. & Rawle (Penn.) 354, 17 Am. Dec. 668, that counsel most strongly rely. In that case, the court held that the defense of the surety in an action brought upon the judgment was limited to a plea of *non est factum* to the bond, a release, the statute of limitations, or some defense of like kind, and that, unless such defense could be made and maintained, the judgment was conclusive. In the state of Pennsylvania, the common law rule and procedure prevail. Without following the reasoning of the court, we think it is sufficient to suggest that it is wholly met and overcome by the dissenting opinion of Chief Justice Gibson.

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In *Bradley v. Chamberlin*, 35 Vt. 277, the sureties were held to be bound by the judgment rendered against the principal, but this case was made to rest upon a statute which provided that, where the judgment against a surety had been rendered by default, the surety might make any defense which the principal might have made in the original case, the court holding that the statute was an implied declaration of the legislative intent to bar the surety from a hearing on the merits if the original judgment had been rendered upon the merits.

We shall not cite or review the many authorities upon this vexed question. The subject is sufficiently discussed in 2 Brandt, Suretyship and Guaranty (3d ed.), § 808; 2 Black, Judgments (2d ed.), § 588; and Murfree, Official Bonds, §§ 598-601.

By the great weight of authority, as we find it to be and as we have really declared it to be in *Costello v. Bridges*, 81 Wash. 192, 142 Pac. 687, L. R. A. 1915A 853, a judgment rendered against the principal is binding upon the sureties when it is provided in the bond that the surety will answer any judgment or pay all damages that may be awarded in an action brought against the principal. In such case, the surety is bound, in the absence of a showing of fraud or collusion or other equitable defense, though he had no notice of the suit against his principal. But where the engagement is to answer in general terms for the faithful performance of a duty imposed by law or arising out of the relation or official character of the principal, a judgment against the principal is no more than *prima facie* evidence in a subsequent case against the sureties. In which event the burden of showing nonliability, either in fact or in law, is upon the surety. It is upon this principle that the case of *Ihrig v. Scott*, 13 Wash. 559, 43 Pac. 633, rests.

The most forceful expression of this rule to be found in the books is that of Chief Justice Shaw in *Lowell v. Parker*, 10 Metc. (Mass.) 309, 43 Am. Dec. 436. This is reflected

in all of the later cases holding to the rule of *prima facie* proof. Upon an objection that the judgment against the principal was *res inter alios* and therefore not admissible against the sureties, the learned justice said:

"We think this objection cannot be supported, under the circumstances of this case. When one is responsible, by force of law or by contract, for the faithful performance of the duty of another, a judgment against that other for a failure in the performance of such duty, if not collusive, is *prima facie* evidence, in a suit against the party so responsible for the other. If it can be made to appear that such judgment was obtained by fraud or collusion, it will be wholly set aside. But otherwise it is *prima facie* evidence to stand until impeached or controlled, in whole or in part, by countervailing proofs."

This language is quoted in *Stephens v. Shafer*, 48 Wis. 54, 3 N. W. 835, 33 Am. Rep. 793, where the court says, on page 62:

"Holding the judgment against the principal alone presumptive evidence, as against the sureties, of the facts established by such judgment, can work no hardship as long as the right is reserved to them of showing that the defense in such action was not made in good faith, was fraudulent, collusive, or suffered to be obtained through mistake as to the facts."

The rule with its only reasonable exception is stated by Mr. Pingrey in his work on Suretyship and Guaranty, § 65:

"It is said to be a general rule that a judgment against a principal is admissible as *prima facie* evidence in an action against the surety, and that sureties upon official bonds are not concluded by a decree or judgment against their principal unless they have had their day in court or an opportunity to be heard. There is, however, a large class of cases especially those of guardian and administrator which are sometimes spoken of as exceptions to the general rule, which sustain the doctrine that sureties are bound by the judgment against their principal to the same extent that their principal is, and such judgment is conclusive against the sureties in the absence of fraud or collusion. And if the

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effect of the obligation is such that the surety is to be bound by the results of the litigation between others he is, in the absence of fraud or collusion, bound by such results. Where the bond is not merely to pay damages, but is an indemnity against liability by judgment, it is conclusive. If it undertakes to pay such judgment as may be recovered, that judgment is conclusive, because that judgment is the event on the happening of which the surety agrees to pay."

One who is charged to meet a secondary liability, in the absence of a contract waiving the right, should be entitled to his day in court. In the case at bar, the engagement is to answer for the faithful discharge of an official duty of an officer. The law will not deny to one who is called upon to answer for the misconduct of another an opportunity to be heard in his own behalf on the primary fact of liability. Such a rule is consistent with common sense and right, and it works no hardship upon one who is seeking, presently or in the future, to recover upon an official bond. He may, and of right ought to, make the surety a party to the action. If he does so, the surety, being a party, may urge *any* defense to the merits. Can it be said that, by wilful design, the surety may be exempted as a party to a suit against the principal, and afterwards, upon direct action against it, be denied any defense which it could have urged if it had been a party to the first action? The law would be a sorry thing indeed if justice depended upon such practices. Moreover, it is provided by statute (Rem. Code, § 959), and being so provided, the suggestion that it ought to be done follows, that an action may be maintained against an officer and his sureties, thus modifying the rule as we understand it to have been at common law that a suit was to be maintained against the principal in the first instance and, after judgment and return *nulla bona*, the surety was to be called to answer a *scire facias*.

Without holding that a party must join the principal and surety, we do hold that, having failed to do so, he must, in a subsequent suit upon a bond other than one binding the

surety to pay any judgment that may be rendered against the principal, admit the right of the surety to be heard upon the merits, the same as it might have been heard if made a party in the first place.

The plea of nonliability on the part of appellant surety company, in so far as it pleads the lawfulness of the act of the sheriff, is sufficient in law and, if sustained in fact, will exempt appellant of liability on the bond. The demurrer to the affirmative answer should have been overruled.

We have said enough to indicate our holding that the contention of the appellant surety company that it cannot be bound in any event by a former judgment unless it is so provided in terms in the contract, is not well taken. We would, however, state our holding in another way. In the absence of an express agreement, the surety is not bound by a judgment entered against its principal in a suit to which it was not a party, but may be bound by a judgment entered against it in a subsequent action. And of the merits, the judgment is *prima facie* evidence.

Reversed, and remanded with directions to overrule the demurrer to the answer, and for trial upon the merits.

ELLIS, C. J., MAIN, MORRIS, and WEBSTER, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 14070. Department One. August 14, 1917.]

PETER MORRISON *et al.*, *Respondents*, v. FIDELITY & DEPOSIT  
COMPANY OF MARYLAND, *Appellant*.<sup>1</sup>

**FORCIBLE ENTRY AND DETAINER—REDELIVERY BOND—LIABILITY.** In forcible entry and detainer, the surety is bound by judgment for the plaintiffs, under a redelivery bond given to enable defendant to retain possession, conditioned to pay the plaintiffs any sum found due and also all costs of the action.

**SAME—APPEAL—STAY BOND.** Under Rem. Code, § 832, an appeal will not stay proceedings in forcible entry and detainer unless a bond is given to pay all rent and other damages pending the appeal.

**SAME—REDELIVERY BOND—LIABILITY—ACTIONS.** Where the judgment in forcible entry and detainer was not stayed and execution against the defendant was returned *nulla bona*, action may be brought against defendant's sureties on his redelivery bond, notwithstanding the pendency of an appeal.

**APPEAL—SUPERSEDEAS—WRIT OF ERROR—LIMITATIONS — POWER OF SUPREME COURT.** A writ of error to the United States Supreme Court does not operate as a supersedeas in any case, under U. S. Rev. St., § 1007, when not sued out within sixty days after the decision appealed from, and the state supreme court cannot grant a supersedeas after the right is lost by lapse of time.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered September 27, 1916, upon findings in favor of the plaintiffs, in an action on redelivery bonds, tried to the court. Affirmed.

*Danson, Williams & Danson* and *Skuse & Morrill*, for appellant.

*Voorhees & Canfield*, for respondents.

CHADWICK, J.—On the 13th day of April, 1914, respondents brought several actions for the recovery of the possession of several parcels of real estate situate in Spokane county. The several defendants who had forcibly entered filed redelivery bonds and kept possession pending a trial in

<sup>1</sup>Reported in 166 Pac. 1122.

the superior court and an appeal to this court, where, in a test case (*Morrison v. Gunning*, 91 Wash. 693, 157 Pac. 1199), respondents prevailed. No supersedeas bond was filed on appeal.

The opinion of this court was filed on May 18, 1916. A petition for rehearing was denied on July 7, 1916. On December 5, 1916, and more than sixty days thereafter, a writ of error to the supreme court of the United States was sued out. The case has not yet been determined in that court. To the suit of respondents on the bonds, the surety, appellant here, answered, setting up the same defenses urged by its several principals in the forcible entry and detainer actions, which, briefly stated, are that the land was public land of the United States and subject to entry, and that the several defendants are qualified as homesteaders under the homestead law. The court below made findings and conclusions denying the legal effect of appellant's pleas, and entered judgment in favor of respondents.

The briefs discuss the merit of the case, but the engagement of the appellant is such that it is barred to raise any questions of fact or law which were considered in the case of *Morrison v. Gunning*, *supra*.

The condition of the bond is as follows:

"Now, therefore, if the said above bounden H. J. Gunning and Nellie Gunning will pay to said Peterson Morrison and Agnes Morrison, plaintiffs in said action, such sum as they may recover for the use and occupation of said premises, or any rent found due together with all damages they, said plaintiffs, may sustain by reason of the defendants occupying or keeping the possession of said premises, and also all costs of said action, then these obligations to be null and void, otherwise to be and remain in full force and effect."

The liability of the appellant to pay the judgment against the principal defendants is fixed and cannot be now inquired into.

See, also, *Larson v. Deering*, *ante* p. 616, 166 Pac. 1119; *Costello v. Bridges*, 81 Wash. 192, 142 Pac. 687, L. R. A.



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1915A 853; *Glover v. Fidelity & Deposit Co.*, 75 Wash. 606, 135 Pac. 486; *Lowman v. West*, 18 Wash. 233, 51 Pac. 373; *Hall & Paulson Furniture Co. v. Schmidt*, 7 Wash. 606, 35 Pac. 424.

Upon oral argument, appellant makes the further contention, suggested but not argued in the briefs, that, under our constitution and the statutes of this state, as well as the Federal practice, the case now on writ of error to the United States supreme court is still pending and that a liability will not be enforced, either by execution against the principals or by suit against appellant, until the case is disposed of by the supreme court, and that the judgment roll in the former case cannot be introduced in this case.

It is expressly provided that an appeal will not stay proceedings in forcible entry and detainer cases unless a bond is given to pay all rent and other damages pending the appeal. Rem. Code, § 832. The appeal is allowed as in other actions. A supersedeas in other civil actions may be had by following the directions outlined in Rem. Code, §§ 1722, 1726, 1727.

If execution will lie against the principal, suit will lie on the bond. The execution in this case was returned *nulla bona*. The former case was ripe for execution and there was nothing to bar the satisfaction of the judgment at the time this action was begun, and there is nothing in the way now unless the bond given under the Federal practice when the writ of error was sued out is in time and in form and fact a supersedeas bond; for it is provided in the U. S. Rev. Stats., § 1007, that a writ of error to the United States supreme court does not operate as a supersedeas in any case unless sued out within sixty days after the decision is appealed from. That this was not filed in time, the record shows.

Upon the authority of the statute, U. S. Rev. Stats., § 1007 (U. S. Comp. Stats., § 1666), and the following cases, it is not within the power of this court to grant a supersedeas, either by leave to file or by construction, after the right is

lost by lapse of time. *Title Guaranty & Surety Co. v. United States, To Use of General Electric Co.*, 222 U. S. 401; *Wallen v. Williams*, 7 Cranch 278; *Kitchen v. Randolph*, 93 U. S. 86; *Saltmarsh v. Tuthill*, 12 How. 387; *Railroad Co. v. Harris*, 7 Wall. 574; *New England R. Co. v. Hyde*, 101 Fed. 397; *Roberts v. Kendrick*, 211 Fed. 970; *Robinson v. Furber*, 189 Fed. 918; Black, Judgments (2d ed.), § 510, note 39.

The judgment is affirmed.

ELLIS, C. J., MORRIS, MAIN, and FULLERTON, JJ., concur

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[No. 14076. Department Two. August 14, 1917.]

R. D. SIMPSON, *Trustee etc., Appellant*, v. WESTERN  
HARDWARE & METAL COMPANY, *Respondent*.<sup>1</sup>

BANKRUPTCY—PREFERENCE—BURDEN OF PROOF—INSOLVENCY—STATUTES. In a suit by a trustee in bankruptcy to recover a preference by a bankrupt corporation, the burden is upon the trustee to show that the bankrupt was insolvent when the preference was made, within the state rule that a corporation is insolvent when it is not able to pay its debts in due course of business, making its assets a trust fund for the payment of its debts; and where there is no controversy upon that issue, it is error to submit it to the jury, under the rule of the bankruptcy act, Fed. Stat. Ann., p. 511, providing that a person is deemed insolvent when his property, undisposed of, shall not, at a fair valuation, be sufficient to pay his debts.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 22, 1917, upon the verdict of a jury rendered in favor of the defendant, in an action to recover assets of an insolvent. Reversed.

*W. W. Keyes* and *Thomas MacMahon*, for appellant.

*F. C. Kapp*, for respondent.

HOLCOMB, J.—This action was instituted by the trustee in bankruptcy of the Tacoma Ornamental Iron Works, a do-

<sup>1</sup>Reported in 167 Pac. 113.

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mestic corporation, to recover for the benefit of the estate certain alleged preferences made to the Western Hardware & Metal Company. In the complaint are set out three causes of action. Briefly stated they are: (1) A payment of \$521.23; (2) the turning over to the defendant of certain materials of the value of \$900; (3) the assignment of a certain account receivable in the sum of \$1,025. The trial judge held and instructed that the company was not insolvent at the time of the transfers if its property, exclusive of concealed, conveyed and removed property, at a fair valuation, was sufficient in aggregate to pay its debts. There is no conflict in the testimony in the record as to the first and third causes of action. In fact, the statements of counsel on the part of respondent in several places admit the receipt by him of money in the amount alleged, and the assignment of the account. The conflict is limited to the evidence in support of the second cause of action. As to the third cause of action, it would appear from the record that there had been no evidence at all as to it. Respondent admits the receipt of the assignment, but claims that nothing had been collected under it.

The Tacoma Ornamental Iron Works had been doing business for a number of years. In October and November it became very much involved financially and, at the instance of one of the officers of the Bankers Trust Company of Tacoma, a meeting of the creditors, who are designated as the principal creditors, was called. A series of these meetings followed, at which representatives of the West Coast Wagon Company, the Tacoma Foundry and Machinery Company, Tacoma Ornamental Iron Works, Olympia Foundry and Machinery Company, and Walsh & Gardner were present. A representative of the Bankers Trust Company was also in attendance at all of these conferences. At the final conference, held November 2, 1914, an agreement was reached as to what should be done concerning the affairs of the Iron Works. This was put into writing and was signed by all of

the creditors above mentioned, except the Bankers Trust Company. The agreement provided for an extension of time for the payment of obligations, and that the business of the company should be managed by a committee representing the creditors. It provided that this committee should continue to have power to act until the claims were paid, and that they should pay them, provided the claims could be paid off within a period of twelve months from the date of the agreement. The appellant lays great stress upon the remarks of Frank J. Speckert, who, as secretary of the Western Hardware & Metal Company, represented his company at the creditors' meetings. These remarks were made at the first meeting, the last of October, when, in answer to a long distance telephone message from the secretary of the West Coast Wagon company, Speckert came to Tacoma from Seattle to attend the meeting. It is claimed that Speckert made the following statement: "This concern is busted, but we cannot hope to get anything out of it unless we held them up, and bolster the proposition along and tide them over, and I believe they will work out all right." The witness who reports this conversation says: "That is the only thing I remember as showing any actual extent of knowledge with reference to the actual standing of the concern."

The date on which the acts claimed by appellant as constituting the preference were performed was November 7, 1914. On this date, it is admitted by respondent in the pleadings and by statement of several witnesses, respondent received the amount of money alleged by the appellant, the assignment of the account receivable, and a certain amount of steel, etc., of which the admitted value was \$337.20. On the same date, a sheet taken from the ledger of the respondent's books showed that the balance due it by the Iron Works was \$1,414.53. Thus it is claimed by the plaintiff that, for an indebtedness of the value of \$1,414.53, including interest, the respondent received money, goods, and paper of the value of \$2,446.23. It might be here noted that the appellant did

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not produce any evidence to show that he had made even an attempt to collect the account receivable, or that it was possible to collect it had there been any attempt.

On Saturday afternoon, November 7, 1914, and on Sunday morning, the 8th, the machinery and stock of the Iron Works were removed from the place of business of the Tacoma Ornamental Iron Works and placed in a warehouse on the tide flats in Tacoma. The appellant alleges that respondent directed this work, but he has failed to produce a witness who saw any one of the respondent's employees there when the things were moved. The only thing that would show that respondent had anything to do with it was the statement of the respondent's witness Dodge, that he tagged the metal materials, which were admitted to have been received by the respondent, with tags bearing the name of the Western Hardware & Metal Company, and that he did this under instructions from Mr. Speckert.

On November 9, 1914, a temporary receiver was appointed by the superior court of Pierce county, and on November 12 following, this receiver was made permanent. On the 21st of November, a petition in bankruptcy was filed, and the Tacoma Ornamental Iron Works was adjudicated a bankrupt on February 19, 1915, after a trial before a jury.

The receiver testified that all the assets of the estate had been reduced to cash, that the total amount realized by him was \$1,100, and that, at the time of this action, he had on hand \$45.30, and nothing had been paid to the general creditors. The admitted amount of the claims was in excess of \$5,000.

The appellant makes his stand on the fact that the Iron Works was not able, on November 7, 1914, to meet its bills, as evidence that it was insolvent. In this regard it is also to be noticed that, at the various meetings of the creditors, the Iron Works, by its president, Mr. Paul, furnished a list of its assets and liabilities, and that this list was accepted by the creditors as true until after the receiver had been ap-

pointed by the state court; that at no time in these proceedings were the liabilities of the Iron Works shown to be over \$8,800. And it further appears that Mr. Reid and Mr. Turner, of the West Coast Wagon Company, in an affidavit for use in the state court, stated that the assets, including plant and stock and accounts receivable, were worth \$9,300. This affidavit was made on November 12, just five days after the transfers. It was also stated by more than one of appellant's witnesses that, on November 7, 1914, the Tacoma Ornamental Iron Works was a going concern. These statements were made at a time when it would have been to the interest of these people to state the contrary, if it were true. This affidavit is explained by the appellant's witnesses as due to the fact that they made it from the memorandum furnished them by Mr. Paul, and that they took his word for it and made no investigation of it. It would also appear that Messrs. Reid, Turner and Graybill had, a few days before this financial trouble, looked over the plant of the Tacoma Ornamental Iron Works with the idea in mind of having their corporation, the West Coast Steel Company, a company owned and controlled by the West Coast Wagon Company, buy the plant. Mr. Graybill testified that, at the time of these meetings of the creditors, they were pretty well informed as to the condition of the Iron Works.

The briefs of counsel in this case have presented the facts very completely, and it is the purpose of this statement to give merely the most important facts.

In a suit by a trustee in bankruptcy to recover a preference alleged to be voidable under § 60b of the act, the burden of proof is upon the trustee to show that the bankrupts were insolvent when the transfer was made, and that the creditor had reasonable ground to believe that the enforcement of the transfer would effect a preference. *In re F. M. & S. Q. Car-lile*, 199 Fed. 612; *In re Gaylord*, 225 Fed. 234.

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive

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of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." U. S. Bankruptcy Act, ch. 1, § 1, No. 15; 1 Fed. Stat. Ann (2d ed.), p. 511.

The mere fact that a creditor is adjudged a bankrupt raises no presumption of insolvency prior to the filing of the petition. 1 Loveland, Bankruptcy, p. 985; *In re Chappell*, 113 Fed. 545; *Kimball v. Dresser*, 98 Me. 519, 57 Atl. 787; *McNeel v. Folk*, 75 W. Va. 57, 83 S. E. 192. But where the question of insolvency is adjudged in determining an act of bankruptcy in an involuntary proceeding, the fact of insolvency may be taken as established by the adjudication. 1 Loveland, Bankruptcy, p. 985.

This court has held that the assets of an insolvent corporation constitute a trust fund for the payment of its debts, in which all of its creditors are entitled to share ratably. *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166, 45 Am. St. 810; *Nixon v. Hendy Machine Works*, 51 Wash. 419, 99 Pac. 11. And that a corporation that is not able to pay its debts in due course of business is insolvent so far as creditors are concerned, and cannot prefer a creditor. *Nixon v. Hendy Machine Works*, *supra*; *Ronald v. Schoenfeld*, 94 Wash. 238, 162 Pac. 43. A conveyance by a domestic corporation after insolvency, preferring creditors, is void, as the property is a trust fund for all of its creditors. *Benner v. Scandinavian American Bank*, 73 Wash. 488, 131 Pac. 1149, Ann. Cas. 1914D 702.

There is an apparent discrepancy between the definition of insolvency under the Federal bankruptcy act, heretofore quoted, and our state rule. In a proceeding in the Federal court to determine the question of insolvency for the purpose of adjudication in bankruptcy, the Federal rule must be followed strictly. But in a proceeding to determine whether a transfer of a debtor is a preferential one, the state rule of in-

solvency is the one to be followed. Appellant requested instructions to the jury to the effect that, if the respondent was not able to pay its debts in due course of business, it would be deemed insolvent, which instructions were refused.

There is very little conflict; in fact, it is almost conclusively shown that, at the time of the transfers complained of, respondent was not able to pay its debts in due course of business. This issue was erroneously submitted to the jury under the instructions of the court. We may presume that the facts resolved by the jury against the insolvency of the respondent at the time of the transfers were so resolved by finding that the aggregate of all of the debtor's property, exclusive of property conveyed, transferred, concealed or removed with intent to defraud, hinder, or delay creditors, at a fair valuation, was sufficient in amount to pay its debts. While we may well doubt that fact, there was evidence that, in the proceedings in composition of the debts with the creditors before the insolvency was established in the state court, the creditors accepted statements of the company showing its liabilities to be something over \$8,800 and its assets, including real estate, plant, and stock and accounts receivable, were worth \$9,300. Nevertheless the fact remains that, at that time, the corporation was not able to pay its debts in due course of business, and it might be considered that its assets were somewhat inflated at that time.

Since it must be determined that the corporation was insolvent within the state rule at the time of the transfers in question, the transfers were preferential and should be recovered.

The judgment is reversed for further proceedings conformable to this opinion.

ELLIS, C. J., MOUNT, FULLERTON, and PARKER, JJ., concur.



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[No. 14101. Department Two. August 14, 1917.]

WILLIAM FORRESTER *et al.*, *Respondents*, v. OMUND O. JASTAD  
*et al.*, *Appellants*.<sup>1</sup>

**ACTIONS—JOINDER—LEGAL OR EQUITABLE.** Under Rem. Code, § 153, authorizing an action for both legal and equitable relief, an action by a vendee for false representations in the sale of land is cognizable in equity where it seeks damages and relief from liability upon notes given for the purchase price, and to restrain the negotiation of the notes to an innocent holder.

**VENDOR AND PURCHASER—FRAUD—INSPECTION — EVIDENCE — SUFFICIENCY.** Relief for false representations by a vendor in the sale of land is not warranted by the evidence, where it appears that misrepresentations as to a boundary were eliminated by the acceptance of a deed correcting it, that the vendee inspected the premises and was aware of the rocky and gravelly character of the soil which had been misrepresented, and any statement as to the amount of the cleared land could have been no more than an estimate, and the vendee had full opportunity to estimate it before buying.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered August 28, 1916, in favor of the plaintiffs, in an action for damages for fraud, tried to the court. Reversed.

*Forney & Ponder*, for appellants.

*C. A. Studebaker*, for respondents.

**FULLERTON, J.**—This is an action for damages for false representations in the sale of land, in which it is sought to offset the damages because of the false representations against certain promissory notes given as part of the purchase price of the land, and to permanently restrain the defendants from transferring such notes and the mortgage given to secure their payment. The cause was tried to the court. No findings of fact or conclusions of law were made, except such findings and conclusions as were incorporated in the decree. The court assessed the damages of plaintiffs in

<sup>1</sup>Reported in 167 Pac. 55.

the sum of \$500, and directed the cancellation of the note for that sum, which was past due, and further made its restraining order against the transfer of that note permanent. The court also directed the delivery to plaintiffs of a deed tendered in court by defendants for a strip of land which had been included in the sale, but to which defendants had no title at the time of the execution of the original deed. This deed was withdrawn from the files and recorded by the plaintiffs. The defendants appeal, assigning various errors, only two of which we have found it necessary to notice.

The appellants first contend that the action was one for damages for the breach of a contract, and therefore the allowance of equitable relief by the court was erroneous. The complaint was based upon the fraud of appellants, but instead of seeking rescission on that ground, they sought to recover damages. It was alleged that appellants had no property other than respondents' notes and mortgage, and asked that any recovery allowed be set off against respondents' notes to appellants still due on the purchase price, and further, that appellants be enjoined from disposing of such notes *pendente lite*, and from foreclosing the mortgage securing the same.

Under Rem. Code, § 153, an action may be maintained for both legal and equitable relief. *Durga v. Lincoln Creek Lumber Co.*, 47 Wash. 477, 92 Pac. 343. The essence of the action is to relieve respondents from liability on notes procured from them by fraud, and to restrain the negotiation of such notes to an innocent holder, whereby the liability of respondents would be confirmed and the appellants enabled to place themselves in a position to defeat the enforcement of any judgment against them for damages. The action is cognizable in equity. *Conaway v. Co-Operative Homebuilders*, 65 Wash. 39, 117 Pac. 716.

The evidence shows that the respondent William Forrester was a ship carpenter working at Bremerton, and that he had decided, owing to his advancing years, to buy a small farm

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on which he could make a home. He noticed in a Seattle newspaper the following advertisement:

“Complete dairy and hog ranch. 80 acres of rich mellow soil. Not a rock or gravel. 35 acres cleared, mostly in clover. 3 acres bearing orchard. 7-room house. Large dairy farm. 6 cows, 4 head of young stock, 3 hogs, young team of draft horses worth \$400.00; chickens, complete set of farm machinery, barn full of hay and other crops, and in a fine farming section. Price \$3,700. One-half cash. Southwest Washington Land Company, Second Ave. Downs Building.”

The respondent repaired to the Seattle office of the realty company, where he was shown a sample of soil from the farm advertised, and was assured that the place was just as represented. He was sent down to the Centralia office of the company the latter part of November, 1913, and was conducted by its local officers to the farm of the appellants Jastad. The day was cold and rainy, and only a couple of hours were spent in an inspection of the place, principally occupied in looking at the cleared portions of the land and the buildings and stock. The respondent did not attempt to go all over the place, which was largely uncleared sloping land with a few benches. The parts he was shown were the only parts adapted to cultivation, but the stony and gravelly nature of the land was readily visible, although respondent testified he did not notice it. The cleared portions, some half dozen in number, were scattered over the eighty acres, were irregular in shape, and it was difficult to estimate the exact acreage in them. Respondent testified the appellant assured him there were thirty-five acres of that class, but the appellant denies stating that amount, either to respondent or to his own agents who advertised that quantity. He claims that he did not tell respondent there were more than twenty-five acres cleared, but he admits speaking of one tract as containing sixteen to eighteen acres and another tract as containing seven acres of cleared land, and that he did speak of other cleared pieces, three small parcels which, according to respondent's testi-

mony of the figures given by him, aggregated ten acres, when in fact there were less than four. In showing the land, a fence on the north side was indicated as the line of the land for sale, with the exception of a small triangular deflection in the fence. This fence was, however, set over on a neighbor's land and inclosed some six acres of the latter. On the east side there were also four and one-half acres not belonging to appellants, but inclosed within their fence. One-half acre of this tract was also cleared land. The respondent expressed himself satisfied after the inspection, and made a payment down, for which he was given the following receipt:

"Nov. 29th, 1913.

"Received of Wm. Forrester three hundred & fifty (\$350) dollars as earnest money on my farm & personal property as advertised.  
I. Jastad."

The deal was closed on January 6, 1914, by the payment of \$1,650 additional, and the execution of three notes secured by mortgage, two of the notes being for \$500 each, and the last for \$700, due, respectively, in one, two, and three years. The respondents went into possession and made no complaint of their bargain until their neighbor on the north claimed some of the land inside of the fence. Appellant was notified of the difficulty and promised to straighten it out, his wife being the daughter of the claimant of the land. The note falling due January 6, 1915, was paid by respondent. As the maturity of the second note began to draw near without appellants having arranged the matter of the disputed boundary, this action was instituted.

As we view the case, the misrepresentation as to boundary on the north is eliminated by the acceptance of the deed correcting it. Likewise, the rocky and gravelly character of the soil is not an element of fraud, as the buyer made personal inspection of the premises, and its gravelly condition was as apparent to a shipwright as it would be to any other person. The statement in the advertisement that the farm had "a rich, mellow soil, without rock or gravel," was, of

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course, a pure fabrication, probably invented by the realty agents rather than the owner. The fact that the four and one-half acres inclosed on the east apparently belonged to the farm is not an element of damage, as the respondents procured title to more than the eighty acres contracted for and there was but one-half acre of that tract cleared, so that its appearance would not sufficiently enhance the value of the farm in the eyes of an intending purchaser as to deceive him to his prejudice.

The evidence respecting the actual quantity of cleared land is in conflict, varying from fourteen to twenty acres, while the quantity represented by the advertisement and, as testified by respondent, by the appellant Jastad also was thirty-five acres. Conceding that there were some fifteen acres of cleared land less than respondents supposed they were securing, any statement by appellant as to the amount does not appear to have been other than an estimate, and not made as the statement of a positive fact upon which respondents were entitled to rely. The respondent William Forrester went over the ground before buying and had full opportunity himself to estimate the quantity of cleared land, and is not in a position to say that he relied upon any representations. We think that the finding of the court as to the existence of actionable misrepresentation is not supported by the evidence. The case of *Van Horn v. O'Connor*, 42 Wash. 513, 85 Pac. 260, is in point. That was a case involving the sale of a half section of land, two hundred and forty acres of which were stated by the vendor to be under cultivation. We there said:

“According to the appellant’s evidence, which must be taken as true on this appeal, both Mr. Lee and Mr. O’Connor represented that there were two hundred and forty acres of land in cultivation upon the half section. They stated at the same time that there were twenty-five or thirty acres more that could be put into cultivation, and not to exceed fifty or sixty acres of waste land out of the three hundred and twenty acres. These two latter statements were clearly expressions

of opinion and, being so, indicate that the exact number of acres in cultivation was also unknown to them, and that the statement that there were two hundred and forty acres in cultivation was more in the nature of an estimate than of a warranty. There appears to be no claim that the land under cultivation had ever been measured by the vendor, or that he or his agent, Mr. Lee, knew or claimed to know the exact number of acres. The appellant stated, in one part of his examination, that Mr. O'Connor said there were two hundred and forty or two hundred and forty-one acres, indicating again very clearly that Mr. O'Connor was merely estimating the number of acres. The land was open and plainly subject to inspection or measurement. The appellant viewed it twice. He was presumably competent to estimate the area before him as well as the respondents. The parties were strangers to each other, and dealing with each other at arm's length. Appellant does not claim that he received less land than he agreed to purchase, but only that a portion of it was not of the quality which he desired it should be. The trial court saw and heard the complaining witness testify, and concluded from his own evidence that the representations made to him were expressions of opinion. We think the court was justified in so doing."

The judgment of the trial court will be reversed, with instructions to allow the plaintiffs to retain the deed tendered and received, and to deny further relief. Neither party will recover costs in this court.

ELLIS, C. J., MOUNT, HOLCOMB, and PARKER, JJ., concur.

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Syllabus.

[No. 14102. Department Two. August 14, 1917.]

THE STATE OF WASHINGTON, *Respondent*, v.GEORGE SULLIVAN, *Appellant*.<sup>1</sup>

**INTOXICATING LIQUORS—SALE—INFORMATION.** An information for selling a quart of "spirituous intoxicating liquors . . . capable of being used as a beverage," is sufficient as being substantially in the language of Rem. Code, §§ 6262-2 and 6262-4, prohibiting the sale of any intoxicating liquor.

**JURY—QUALIFICATIONS—BIAS.** A juror is not disqualified by acquaintance with the prosecuting attorney and confidence in his ability and integrity.

**SAME.** In a prosecution for selling liquor, a juror is not disqualified by the fact that she favors the prohibition law.

**CRIMINAL LAW — EVIDENCE — CONFESSIONS.** Admissions of guilt made to police officers while in their custody are admissible against accused, when they were freely and voluntarily made, since they were not made under the influence of fear produced by threats.

**TRIAL—COMMENT ON EVIDENCE.** It is not error, as comment on the evidence, for the court, in a colloquy with counsel, to correctly state what the evidence was upon a point in question.

**CRIMINAL LAW—REASONABLE DOUBT—INSTRUCTIONS.** A reasonable doubt is properly defined as a substantial doubt having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such as arises from the evidence or want of evidence, and the absence of which would, after deliberation, enable one to have a settled and abiding conviction of guilt.

**TRIAL—INSTRUCTIONS—SUBMISSION.** It cannot be presumed that the bracketing of parts of an instruction, taken to the jury room, unduly influenced the jury.

**INTOXICATING LIQUORS—SALE—DELIVERY—EVIDENCE—SUFFICIENCY.** A delivery of intoxicating liquor unlawfully sold is sufficiently proven where it appears that accused, after making the bargain to sell, said that he would leave the bottle with the liquor behind a broom in a certain place and that the purchaser found it there and took it away.

**CRIMINAL LAW—HARMLESS ERROR—CURE BY INSTRUCTIONS.** Prejudicial error cannot be predicated upon misconduct of the prosecuting attorney in starting to comment on the fact that the defendant had

<sup>1</sup>Reported in 166 Pac. 1123.

not testified, where the court immediately checked such statement and instructed the jury that no inference could be drawn from defendant's failure to testify.

**SAME—TRIAL—INSTRUCTIONS—CREDIBILITY OF EMPLOYED WITNESSES.** Where the jury are instructed to consider the interest and bias of all witnesses, it is not error to refuse an instruction respecting the weight to be given and the interest of witnesses employed by the prosecuting attorney to obtain evidence against the accused.

Appeal from a judgment of the superior court for Lewis county, Easterday, J., entered October 19, 1916, upon a trial and conviction of violating the state-wide prohibition law. Affirmed.

*C. D. Cunningham and Forney & Ponder*, for appellant.

*W. H. Cameron and Floyd M. Hancock*, for respondent.

HOLCOMB, J.—The first ground upon which appellant seeks a reversal of the judgment upon verdict convicting him is that the court erred in overruling his demurrer to the information.

The information charged him as follows:

“ . . . did then and there wilfully and unlawfully sell one bottle of spirituous intoxicating liquor, being about one quart in quantity, to one Wm. Estep, which said intoxicating liquor, so sold, was capable of being used as a beverage.”

Our statute, Rem. Code, § 6262-4, prohibits the sale of *any* intoxicating liquor. Section 6262-2 defines the phrase “intoxicating liquor” to “include whiskey, brandy, gin, rum, wine, ale, beer and *any* spirituous . . . liquor.” The information charged the appellant with selling a prohibited liquor: “spirituous intoxicating liquor;” and added that it was liquor capable of use as a beverage. The charge was substantially in the language of the statute, and was so stated that a man of common understanding could easily determine the nature of the offense with which he was charged. This was all that was essential. *State v. Wright*, 9 Wash. 96, 37 Pac. 313; *State v. Holedger*, 15 Wash. 443, 46 Pac. 652; *State v. Nelson*, 39 Wash. 221, 81 Pac. 721.



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"The class or species of the liquor sold is not a material ingredient of the offense, and the defendant is not entitled to more detailed information on this point, if the other allegations of the indictment describe the particular transaction with sufficient certainty to identify it." Black, Intoxicating Liquors, § 467.

See, also, *Callahan v. State*, 2 Ind. App. 417, 28 N. E. 717.

This determination disposes also of appellant's fourth claim of error, that the court erred in admitting in evidence a bottle of liquor and evidence that it was whiskey or spirituous, and intoxicating.

The next claim is based upon the denial of a challenge by appellant to a juror. The juror, Mrs. Schmid, testified on *voir dire* to some acquaintance with the deputy prosecuting attorney, some confidence in his ability and integrity, and a belief in the prohibition law. She apparently did not thoroughly understand many words and phrases used by court and counsel, but she displayed a fairly comprehensive knowledge of ordinary English, such as laymen in ordinary walks of life commonly use. The prosecuting attorney was not on trial, and this juror evinced no special partiality for him or for his side of the case as such. She stated that she would not believe him rather than others when he argued to the jury. She had an undoubted right to favor the prohibition law exactly as she might favor any other criminal law, and the fact that a prospective juror favors any penal statute is no evidence that such juror is prejudiced against any person accused of violating that law. In fact, the answers of this juror convince that she was a very unbiased juror. The trial judge who saw and heard her testify evidently so believed, and exercised his undoubted discretion as trier of that fact in denying the challenge for cause. We can see no abuse of discretion therein. *State v. Boyce*, 24 Wash. 514, 64 Pac. 719; *State v. Croney*, 31 Wash. 122, 71 Pac. 782; *State v. Montgomery*, 57 Wash. 192, 106 Pac. 771.

The court permitted the state to show certain admissions of appellant concerning the offense charged against him to the officers who had him in custody. It is urged that this was error because it was not first shown that the appellant was not under the influence of fear produced by threats when he made them. The testimony of the prosecution as a whole shows, however, that the alleged admissions were made freely and voluntarily; that, in the absence of a counter showing, is all-sufficient, covering the preliminary essential and negating the idea of being made under fear produced by threats. *State v. Mann*, 39 Wash. 144, 81 Pac. 561; *State v. Washington*, 36 Wash. 485, 78 Pac. 1019; *State v. Wilson*, 68 Wash. 464, 123 Pac. 795.

Error is assigned upon certain statements of the court as being prejudicial comment on the evidence. When the sheriff of the county, a witness for the prosecution, was upon the stand, he testified as to an examination of the appellant by the prosecuting attorney in the presence of the witness and other witnesses, and that the following, among other things, occurred: Studebaker (prosecuting attorney) quizzed the victim. He talked to him there. He (Studebaker) said he was not particular about arresting people of his (Sullivan's) kind, but was particular to get the man who furnished the liquor; said he would be inclined to be lenient with him if he (Sullivan) wanted to tell him of his own free will where he got the liquor, but he told him he didn't need to talk to him unless he wanted to.

"Q. Did he say anything about what Judge Rice would do? A. No, he didn't say anything about what Judge Rice would do at all. Q. Didn't he tell him, if he did not state from whom the liquor came that Judge Rice would give him from thirty to sixty or ninety days, and would not give him a fine at all? A. No, he didn't say Judge Rice would do that. He told him under the law that could be done; he *could* do that. Q. Well, what was there said to him about that? A. Why, he told him, he says, 'If you don't want to tell, of course there is no leniency coming to you.' He says,

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‘I will have to prosecute you, and you will get whatever the judge is mind to give you,’ and he told him—he didn’t say sixty days; he said thirty to ninety days.”

There was some further testimony and some colloquy between counsel for appellant and the prosecuting attorney and the court, counsel for appellant insisting that the evidence above quoted showed that a threat was made to the appellant, which upon its face disqualified the evidence of any admissions on the part of appellant. Objections were made to the court making any statement in regard to what the evidence was. The court said:

“I will say that I do not regard any testimony that has come in as substantially a threat. Mr. Forney: We take exception to your honor’s statement to the jury. He stated that Mr. Foster stated that the court would give him from thirty to ninety days in jail. The Court: No, he did not say that. He said he told him what the penalty would be; said Studebaker told him the penalty would be thirty to ninety days in jail. Mr. Forney: We take exceptions to your honor’s statement as a comment on the evidence. The Court: I will sustain the objection.”

It is obvious that what the court stated the evidence was conformed exactly to the evidence in the record. It is also obvious that the evidence did not in any way show any threat made by the prosecuting attorney, but merely a statement as to what the penalty of the law might be in case of a conviction for the offense. The court committed no error in that regard.

Instruction No. 4, given by the court, was almost a precise reproduction of the instruction defining a reasonable doubt discussed in *State v. Harsted*, 66 Wash. 158, 119 Pac. 24. After the verdict, exceptions were taken to this instruction on the ground that it was verbose and argumentative, and that a portion was bracketed therein by lead pencil marks, as follows: “It does not mean that the state should prove conclusively,” and “and very few things in the domain

of human knowledge are susceptible of absolute proof. Absolute proof is not required."

It cannot be assumed that the pencil marks bracketing these sentences were made by the court before giving the instructions to the jury; and, as the jury took the instructions to the jury room with them, it is possible that the bracketing was done by some juror while discussing the instructions. At any rate, there is no showing, and we cannot presume, that such an inadvertent and inconsequential a thing as the bracketing of these sentences by pencil marks unduly influenced the jury, and that the jury did not consider the instructions as a whole. Instruction No. 4 as a whole has been approved by this court in the case above cited.

It is also urged that the state, even if the evidence justified a finding of a sale, failed to prove a delivery, and especially of the kind of liquor which defendant was charged with selling. The evidence is that accused made a bargain to sell about a quart of liquor to Estep for two dollars, and said that he would leave the bottle with the liquor behind a broom in a water closet in the pool hall where appellant worked, and that Estep would find it there; that Estep went to the water closet, found the bottle of liquor behind a broom there, and took it with him to his room in a hotel. This constitutes a sale and delivery. The bargain was complete. It was not necessary in order to constitute a delivery for the bottle to be handed from the hand of appellant into the hand of Estep. If appellant directed Estep where the article might be found and Estep found it there and took it into his possession, that, according to all the rules that we ever heard of, would constitute a sufficient delivery of the thing sold.

It is strenuously urged that there was misconduct on the part of the prosecuting attorney. Appellant did not himself testify, nor were any witnesses placed upon the stand in his behalf. At the conclusion of the state's case, a motion was made for an instructed verdict in favor of appellant, which was denied. In the argument of the case, the prosecutor

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made the following remark: "Counsel for defendant, not having offered any evidence here, may carry his bluff one step further—" at which point objection was made that the remark constituted prejudicial conduct on the part of the prosecutor, upon which the court stated:

"I have instructed the jury in the instructions that no inference is to be drawn against defendant by reason of his not taking the witness stand; that you are to determine the question of his guilt or innocence from the evidence that has been introduced. Counsel will refrain from making any comment upon the fact that he has not taken the stand."

Some further colloquy occurred between the counsel, prosecutor attempting to complete his sentence, and finally completing it by saying:

"Counsel may carry their bluff one step further by not making any argument in this case. Let them do as they like."

The court had instructed the jury that they were to draw no inference from the fact that the defendant did not testify in his own behalf, and upon the argument of the prosecutor, reiterated the instruction and further directed the prosecutor to make no more reference to that subject. It appears that the jury were positively advised of the law in the premises, and the rights of the appellant were fully protected by the court upon the argument of counsel, and no prejudicial error was made.

It is contended that there was no sufficient evidence to warrant the case going to the jury. Without this assignment being discussed at length, an examination of the record clearly discloses that there was ample evidence upon which to convict, if the jury believed it; and there was no contradiction thereof.

The instructions given by the court as a whole were correct. Some objection is made to the refusal of the court to give an instruction requested by the appellant, to the effect that, if they found from the evidence that certain men were

employed by the sheriff's office to obtain evidence against the accused, greater care should be exercised by the jury in weighing the testimony of such witnesses, by reason of their natural and unavoidable tendency and bias of mind to construe everything against the accused. Certain cases are cited sustaining such instruction, but we do not approve them. The court instructed the jury, in conformity with the well settled practice in this state, that the jury were to consider the interests and bias of all witnesses. That is sufficient, and it would be improper for the court to call specific attention to the character or possible bias of any particular class of witnesses and authorize the jury to weigh their evidence with a different rule from that applied to others, except in the case of accomplices, under our well recognized rule.

A careful examination of the entire record convinces us that the appellant was accorded a fair trial, that the instructions given by the court were appropriate to the issues and correct in law, and that the requested instructions of appellant were incorrect and were properly refused.

The judgment is therefore affirmed.

ELLIS, C. J., MOUNT, FULLERTON, and PARKER, JJ., concur.

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[No. 13452. *En Banc*. August 17, 1917.]

HARRY C. HEERMANS, *Appellant*, v. F. G. BLAKESLEE,  
*Respondent*.<sup>1</sup>

CHATTEL MORTGAGES—ASSIGNMENTS—CONSTRUCTION—CHOSE IN ACTION. An assignment of the "present and future earnings and income" of a water works company, "as security for payments and advances" is simply an assignment of a chose in action and not a chattel mortgage, and need not be accompanied by an affidavit of good faith or recorded as required by Rem. & Bal. Code, § 3660 (overruling on rehearing, *Id.*, 93 Wash. 595).

CHATTEL MORTGAGES—PROPERTY SUBJECT—CHOSE IN ACTION. Rem. Code, § 3659, providing that chattel mortgages may be made "upon all kinds of personal property" refers to tangible property that may be taken into possession and not intangible property such as accounts and income and things in action (overruling on rehearing, *Id.*, 93 Wash. 595).

GARNISHMENT—PRIORITY—ASSIGNMENTS—RIGHTS OF ASSIGNEE—ACTIONS—COMPLAINT. Where a water company, as security for advances, assigned one-half of its water receipts and earnings, retaining one-half for its own use to apply on operation and maintenance expenses, and thereafter a creditor obtained a judgment on account of goods sold subsequent to the assignment and garnisheed certain receipts and income of the company, the assignee cannot claim a right superior to the garnishment or seek an accounting without showing that the writs of garnishment were levied upon more than half of the receipts and income.

. FULLERTON and CHADWICK, JJ., dissent.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered March 13, 1916, dismissing an action for an accounting, upon sustaining a demurrer to the complaint. Affirmed.

*Frank C. Owings* and *Thos. L. O'Leary*, for appellant.

*Thomas M. Vance* and *Chas. D. King*, for respondent.

*Hughes, McMicken, Ramsey & Rupp, Peters & Powell, Kerr & McCord, Cullen, Lee & Matthews*, and *Bausman, Oldham & Goodale* (*Walter L. Nossaman*, of counsel), *amici curiae*.

<sup>1</sup>Reported in 167 Pac. 128.

## ON REHEARING.

MOUNT, J.—The original opinion in this case may be found in 93 Wash. 595, 161 Pac. 489. We there affirmed the judgment of the lower court upon the ground that the contract in question was, in substance, a chattel mortgage, and because the same was not accompanied by an affidavit of good faith and was not acknowledged and recorded, we held that it was void as a chattel mortgage, and for that reason, affirmed the judgment. A petition for a rehearing was afterwards granted, and the case was argued to the court sitting *En Banc*. A majority of the judges are now of the opinion that the contract here in question is simply an assignment of a chose in action and not a chattel mortgage, and that Rem. Code, § 3659, refers to tangible property which may be taken into possession and not to intangible property, such as accounts and mere things in action which may not be taken into actual possession. *Bellingham Bay Boom Co. v. Briscois*, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238.

The facts are fully stated in the former opinion and need not be restated here. The contract is there sufficiently set out. It purports upon its face to be an assignment of all the earnings and income from sales of water and from service performed as a water company which shall become due and payable on or after January 1, 1915. The contract then recites that the creditor (the appellant Heermans) constitutes the debtor (the Washington Public Service Company, which we shall call the water company), his agent to collect and receipt for all the earnings and income by the contract assigned, and the creditor (Mr. Heermans) agrees that if, on each day on which such collections are made until the debt is fully paid, the water company shall pay to Mr. Heermans one-half of the income and earnings collected on that day,

“ . . . and if the debtor shall perform and observe those agreements on its part hereinafter contained, the debtor may retain the remaining one-half of each such day's collections for its own use, freed from all liens hereby created and



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freed from all liability to account to the creditor therefor as his agent.

“And further in consideration of the premises the debtor agrees with the creditor that the remaining half of its collections reserved to the debtor by any of the provisions of this agreement shall be by it promptly applied to the expense of operating and maintaining its water plant in Olympia (with such minor additional service connections and other additions as may be necessary to keep the plant in proper condition for service), including in such expense of operation and maintenance a monthly salary list not exceeding \$515, . . . .”

We shall assume, for the purposes of this case, that this contract is simply one of assignment; that the future earnings and income of the water company had a potential existence capable of assignment; and also that the water company had the power to make the contract of assignment. It is plain from a consideration of the contract, as hereinabove stated, that it was the intention of the parties that but one-half of the earnings and income were assigned to Mr. Heermans. The contract states:

“The debtor hereby assigns to the creditor all such present and future earnings and income from sales of water . . . .”

It then provides that the debtor (the water company) shall collect the revenues earned and shall pay one-half thereof to Mr. Heermans, and that, if it shall perform those agreements, it may retain the remaining one-half for its own use, freed from all liens hereby created. The contract then provides that this one-half so retained by the water company shall be applied to the expense of operating and maintaining its water plant with service connections and additions necessary to keep the plant in condition, including in such expense of operation and maintenance a salary list not exceeding \$515. So it is apparent that but one-half of the income of the water company is assigned to Mr. Heermans. The complaint shows the respondent furnished goods, wares, and merchandise to

the water company after the date of this assignment, and obtained a judgment for some \$1,300 against the water company. Certain users of the water were garnished, and the money owing by these users was paid into court and afterwards taken down by the respondent in part satisfaction of the judgment. The complaint nowhere shows the amount of income of the water company, and it does not show that more than one-half of the income of the water company has been taken upon the judgment, or has been affected by the garnishments which the respondent has levied. The complaint shows that no specific items were assigned. The assignment was one-half "of all the earnings and income." The complaint alleges that the suing out of the writs of garnishment is impairing appellant's contract of assignment and impairing his said security, but we find no allegations in the complaint to support these conclusions of law. Since the contract of assignment was an assignment in effect of one-half of the income of the water company, then, before the security of the appellant could be impaired, it was necessary to set out facts which would show that the particular sums garnished were the property of the appellant, or that the respondent, in issuing writs of garnishment, was taking more than one-half of the income assigned by the water company to the appellant. Since the complaint does not show these facts, it is clearly insufficient to base a cause of action upon for an accounting, or for an injunction to restrain the respondent from collecting his judgment against the water company. The water company was authorized by the contract of assignment to purchase materials to keep the water plant in repair and operation. It was also authorized to pay its salary list, not exceeding \$515 per month, and to use one-half of the income for these purposes for its own benefit. A judgment creditor who furnished goods, wares, and merchandise for the use of the water company, or one employed at a salary, would clearly be authorized, after judgment, to

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garnish the debtors of the water company to the extent of one-half of the earnings and income.

We are satisfied that the complaint failed to state a cause of action, and that the lower court properly sustained the demurrer.

The judgment is therefore affirmed.

ELLIS, C. J., MAIN, MORRIS, HOLCOMB, and WEBSTER, JJ., concur.

PARKER, J., concurs in the result.

FULLERTON and CHADWICK, JJ., dissent.

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[No. 13703. Department Two. August 17, 1917.]

WILLIAM R. CRAWFORD, *Plaintiff*, v. SEATTLE, RENTON &  
SOUTHERN RAILWAY COMPANY *et al.*, *Defendants*,  
JAMES W. WALL, *by his Guardian etc.*,  
*Appellant*.<sup>1</sup>

APPEAL—RECORD—STATEMENT OF FACTS—PRIORITY OF CLAIMS—RECEIVERS. A hearing had upon notice to fix the priority of claims in a receivership, raises a mixed question of law, which can be reversed on appeal only by bringing up in the record the facts upon which it is based.

RECEIVERS — PRIORITY OF CLAIMS — DETERMINATION — PLEADINGS. Upon a hearing to fix the priority of claims in a receivership, a written denial of a claim of priority is not necessary, inasmuch as priority will be determined irrespective of any claim made.

RECEIVERS—CLAIMS—PRIORITIES. A claim for personal injuries sustained in the operation of a road prior to a receivership should not be given a preference over prior mortgages.

Appeal from an order of the superior court for King county, Frater, J., entered January 19, 1916, adjudging the priority of claims in a receivership, after a hearing before the court. Affirmed.

<sup>1</sup>Reported in 167 Pac. 44.

*Carkeek & McDonald* and *F. C. Kapp*, for appellant.

*Higgins & Hughes* (*Hyman Zettler*, of counsel), for respondents.

MOUNT, J.—This appeal is prosecuted from an order of the lower court fixing the priority of claims in a receivership.

The facts are in substance as follows: The appellant is a creditor of the Seattle, Renton & Southern Railway Company. He obtained a judgment for personal injuries against that company on the 15th day of March, 1913. In April of that year, he filed with the receivers a claim for the amount of the judgment. In this claim it was stated that, in the month of December, 1911, the road was taken possession of by officials acting for the bondholders of the railway company; that, in January, 1912, appellant was injured by a collision on said road; that, on the 3d day of November, 1912, a judgment was rendered in his favor, which judgment was afterwards set aside and a new trial granted; that, in the meantime, receivers were appointed, who took possession of the road and thereafter defended the action, which resulted in a judgment of \$5,487.90, on the 15th day of March, 1913. The claim then recites,

“that by reason of the fact that the injury was received shortly before the appointment of the receiver, as aforesaid, and by further reason of the fact that the injury was received while the road was in the direct control, supervision and operation of the bondholders, this claimant makes a claim against the said road for the sum of \$5,487.90 and claims a priority over all claims of any other nature, kind or description, and particularly against all claims of the bondholders, stockholders or mortgagees of said road.”

The amount of this claim is not disputed. On October 30, 1914, the appellant was served with a notice that, on November 5, 1914, there would be a final hearing on all claims for the purpose of fixing the amounts and priorities, if not already determined by the court. At this hearing the court determined that there were four classes of claims, designated

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as "A," "B," "C," and "D." Claims in class "A" and "B" were court costs and expenses of receivership. The claims in these classes were adjudged prior to all other claims. The claims in class "C" consisted of prior mortgages upon the property of the railway company, and were ordered paid prior to the general creditors. Claims in class "D" were general creditors of the railway company. Upon a hearing of these claims, the court entered an order fixing the priority of all the claims, and appellant's claim was fixed in class "D." He appeals from that order and makes two contentions: First, that, because there was no written answer to his verified claim the averments thereof must be taken as true; and second, that, if taken as true, appellant was entitled to priority of payment ahead of the claims of the bondholders secured by mortgage upon the property of the railway company. The appellant has not brought here a statement of facts. He relies wholly upon the allegations of his claim and upon the fact that there was no written denial of the statements therein at the hearing. The respondent has brought here a statement of facts certified to by the trial court. The appellant has moved to strike this statement of facts because it was not served as a proposed statement of facts until eight months after the entry of the order appealed from. In the case of *Lauridsen v. Lewis*, 47 Wash. 594, 92 Pac. 440, where the appellant proposed no statement of facts, and where the respondent did propose a statement of facts, which was certified, and where a motion was made to strike the statement of facts, we said:

"It is argued, in effect, that the party who appeals is alone competent to propose a statement of facts. Bal. Code, §§ 5057 and 5058 (P. C. §§ 674, 675), certainly authorize any party to any action or proceeding, and at any stage thereof, to propose and cause to be certified a statement of facts or bill of exceptions."

The sections there referred to are now Rem. Code, §§ 388 and 389. The opinion in that case does not show when the

statement of facts was proposed by the respondent. We think it is not necessary to pass upon the motion, because it is conceded that the appellant was notified that a hearing would be held by the court at a stated time to fix the priority of claims allowed by the receiver. A hearing was had and, upon such hearing, the court determined that the appellant's claim was not entitled to priority over claims classed as "A," "B," and "C." The determination of the priority of claims was a mixed one of law and fact. It was the duty of the court in determining the priority of claims to determine their character, and in order to do so, to examine into questions of fact as to when, how, and for what purpose the claims originated or the debts they represented were incurred.

"The court in which the receivership is pending may fix priorities as between the parties before it, and the relative dignity or priority of the different claims against property in the hands of a receiver may be settled as well before as after the sale of the property." 34 Cyc. 363.

See, also, 34 Cyc. 346B.

The court no doubt determined the priority of the different claims, both upon questions of fact and of law, and determined that the claim of the appellant was a claim which should be paid along with the general creditors of the railway company. It therefore devolves upon the appellant to bring to this court the record of that proceeding to show that the trial court erred in adjudging his claim one with the general creditors. Since he has not brought the record here, we must assume that the conclusion of the lower court was based upon facts warranting that conclusion, because the appellant must show error. Error may not be assumed.

Appellant insists that, because there was no written answer to his claim, which stated its priority over all other claims, the allegations of the claim must be taken as true. The statute does not require a written answer in such cases, and no case has been cited to us which holds that a verbal

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answer is insufficient where the court is authorized to determine the priority of claims. Some cases are cited by the appellant to the effect that, where the amount of a claim is not disputed, it will be taken as confessed. Assuming this to be the rule, it does not follow that, where the court is authorized to determine the priority of claims, a written denial of a claim of priority is necessary, because the court will determine, in considering the priority of claims, the nature and character of the claim, irrespective of whether a claim of priority is made or not. We are of the opinion, therefore, that it was unnecessary to file a written denial of a claim of priority, and that claims of priority are adjusted by the court upon the circumstances of the claim, and not necessarily upon an admission of priority by the receivers.

It is next argued by the appellant that his claim for personal injuries is entitled to priority over a prior mortgage. The great weight of authority is opposed to this contention. In the case of *Gregg v. Metropolitan Trust Co.*, 197 U. S. 188, it was held that claims for supplies furnished a railroad company were not entitled to priority over a mortgage recorded before the contract for supplies was made. The court there said:

“An impression that such a general rule was to be deduced from the decisions of this court led to an evidently unwilling application of it in *New England R. Co. v. Carnegie Steel Co.*, 75 Fed. Rep. 54, 58, and perhaps in other cases. But we are of opinion, for reasons that need no further statement, *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 97, that the general rule is the other way, and has been recognized as being the other way by this court.

“The case principally relied on for giving priority to the claim for supplies is *Miltenberger v. Logansport etc. Railway Co.*, 106 U. S. 286. But while the payment of some pre-existing claims was sanctioned in that case, it was expressly stated that ‘the payment of such debts stands, *prima facie*, on a different basis from the payment of claims arising under the receivership.’ The ground of such allowance as was made was not merely that the supplies were necessary for

the preservation of the road, but that the payment was necessary to the business of the road—a very different proposition. In the later cases the wholly exceptional character of the allowance is observed and marked.”

And in *Pennsylvania Steel Co. v. New York City R. Co.*, 165 Fed. 457, it was said:

“The proposition that claims for torts committed during the operation of the road prior to receivership should be given a preference over the claims of secured creditors has been often presented to the federal courts. It is unnecessary to add anything to the exhaustive discussion which is found in the opinion of the Circuit Court of Appeals of the Eighth Circuit. *St. Louis Trust Co. v. Riley*, 70 Fed. 32, 16 C. C. A. 610, 30 L. R. A. 456. In the reasoning and conclusions expressed in that opinion I fully concur, and find nothing in any later reports, either of the Supreme Court, or of the Circuit Courts of Appeal, to modify such conclusions in any way. On the contrary, the following authorities are to the same effect: *Veatch v. American Loan & T. Co.*, 79 Fed. 471, 25 C. C. A. 39; *Id.*, 84 Fed. 274, 28 C. C. A. 384; *Atlantic Trust Co. v. Dana*, 128 Fed. 209, 62 C. C. A. 657; *Atchison, T. & S. F. v. Osborn*, 148 Fed. 606, 78 C. C. A. 378; *Central Trust Co. v. Warren*, 121 Fed. 323, 58 C. C. A. 289; *Farmers' L. & T. Co. v. Northern Pac. R. R.*, 79 Fed. 227, 24 C. C. A. 511.

“The application to give certain directions as to accounting, etc., is therefore denied; the tort claims accruing prior to receivership rank with the general unsecured claims, and will be so classified.”

We think the great weight of authority is to that effect. We find no error in the judgment of the trial court, and it is therefore affirmed.

ELLIS, C. J., HOLCOMB, FULLERTON, and PARKER, JJ., concur.



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Syllabus.

[No. 13938. Department Two. August 17, 1917.]

N. R. WALTERS *et al.*, Respondents, v. THE CITY OF  
SEATTLE, Appellant.<sup>1</sup>

MUNICIPAL CORPORATIONS—STREETS—DEFECTS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The negligence of the city and the contributory negligence of the owner of a truck, overturned at the foot of a steep pitch, where the city had left broken and uneven planking and a hole six or seven inches deep that filled with water, are questions for the jury, where the city had notice of the defect, other accidents had happened there, and the plaintiff, who was familiar with the street, but had to use it, used all the care possible in going down the grade, and his brake, renewed that day, failed to hold owing to the slippery condition of the street, whereby the truck gained momentum and tipped over when it reached the hole in the street.

SAME—CLAIMS—DESCRIPTION OF PROPERTY—SUFFICIENCY. The wet and slippery condition of a precipitous approach to a street intersection, not imputable to the city but to the phenomena of nature, need not be set forth in a claim for damages due to defective planking and a hole at the street intersection, in order to entitle plaintiff to give evidence of such slippery condition, whereby plaintiff lost control of a truck in approaching the defects in the street; since the condition is presumably not permanent, and is one which the city is bound to consider.

SAME—DEFECTS IN STREETS—PERSONAL INJURIES—ACTIONS—TRIAL—INSTRUCTIONS. In an action for personal injuries from a defect in a street, an instruction that, if the city's negligence was the proximate cause of the injury, the plaintiff could recover, notwithstanding in operating a truck he was exceeding the speed limit, providing that fact was only a remote cause or a mere condition and not the proximate cause of the accident, is not contradictory of instructions that if plaintiff was negligent, it made no difference how negligent he was, and correctly defining the law of contributory negligence and plaintiff's degree of care and that any omission thereof which caused or contributed to or was the proximate cause of the injury, barred recovery.

SAME. In such an action, in defining contributory negligence as to conditions that "plaintiff knew," it is not error to omit to instruct as to conditions that he "should have known," when there was no such element in the case.

<sup>1</sup>Reported in 167 Pac. 124.

**SAME.** In such an action, instructions requiring the jury to determine whether the proximate cause of the accident was the defective condition of the street or the manner in which plaintiff drove his truck upon it, are correct.

**SAME.** In such an action, it is proper to refuse an instruction assuming that an automobile is itself an agency dangerous to the occupant.

**TRIAL—INSTRUCTIONS—ASSUMPTION OF FACTS.** It is not error to refuse instructions assuming reckless conduct heedless of obvious dangers where there was nothing of that sort in the case as presented.

Appeal from a judgment of the superior court for King county, Jurey, J., entered September 30, 1916, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained through a defective street. Affirmed.

*Hugh M. Caldwell and Frank S. Griffith*, for appellant.

*Beeler & Sullivan*, for respondents.

**HOLCOMB, J.**—In this action respondents recovered judgment for damages for personal injuries sustained by respondent N. R. Walters as the result of the overturning of his automobile truck, due to the alleged dangerous condition of one of the appellant's streets.

The facts, briefly stated, are as follows: Lake Dell avenue and East Alder street, both within the city of Seattle, form what is commonly known as Lake Dell drive. East Alder street forms the east end of Lake Dell drive, and runs approximately east and west and intersects Erie street and Lakeside avenue. Both of the latter run north and south. Lakeside avenue parallels Lake Washington. Erie street is one block west of Lakeside avenue. Lake Dell drive approaches Lakeside avenue from 32d avenue south in a series of curves, turns, and grades, the grades varying from two to twelve per cent. East Alder street, from Erie street to Lakeside avenue, descends at a grade of twelve per cent. Lake Dell drive is the only street or roadway that can be

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used by commercial vehicles in reaching Leschi Park boat and ferry landing. In November, 1915, the appellant finished the work of planking East Alder street, save at the intersection of East Alder street and Lakeside avenue. Lakeside avenue is a graveled and macadamized street. The planking at the intersection point was, according to the contention of the respondent, left broken, rough, and uneven, and there was a hole about fifty feet in length, from six to eight inches in depth, and one and one-half to two feet in width, which, at the time of the accident, was full of water. In order to avoid this hole it was necessary for vehicles driving down East Alder street to turn out of the regular line of travel and drive to the wrong side of the street by turning towards the left, which respondent did. There was a triangular space in the intersection about twenty-seven feet in greatest width, left unmacadamized and unpaved and usually muddy and soft, over which vehicles at this time were unable to pass.

Respondent is a resident of the town of Bellevue, Washington, located upon the east shore of Lake Washington, and there owns and operates a feed store. In the operation of this business he uses a one-ton Ford automobile truck. At the time of the accident, he had been driving an automobile about three months. In going to and from Seattle it is customary for residents of Bellevue to use the ferry, which has its landing place at Leschi Park, in Seattle. In getting to and from this landing it is necessary for trucks to use the Lake Dell drive and Lakeside avenue. It was also customary for Walters to drive his truck to Seattle and purchase merchandise for his store. On December 4, 1915, he made one of these trips. After calling at various wholesale places and making purchases elsewhere, at about 4 p. m. he started down Lake Dell drive. He made the run on the right side of the street without difficulty until he came to the East Alder street section of the drive, at a point a distance of about two hundred and thirty feet west of Erie street. The terri-

tory just west of Erie street for a distance of four or five blocks has considerable elevation, so that the drainage during the rainy season flows towards the east, and this seepage of water constantly keeps the planking on East Alder street wet and slippery, in which condition it was at that time. At this point, to use the respondent's own language: "I was going down what is known as the Lake Dell drive plank road, and had on a load of feed, and it was pretty slippery, and I held the truck under control all right until I came down to this last steep pitch on East Alder street, and it seemed to be steeper there than any other part of the street and my brakes failed to hold." He further testified that the brakes in the car had been renewed that day and were in good condition, and that they failed to hold because of the slippery condition of the steep descent to the intersection of Lakeside avenue. Walters ran down East Alder street and, at the time he came to the intersection with Lakeside avenue, he estimates that he was going at a rate of speed of from nine to eleven miles an hour. When he came to the last part of the planking, where it was rough, he started to make a turn to run south on Lakeside avenue. His truck tilted to the left and ran on two wheels until it came to the depression or hole, when it tipped over on its left side. He was caught under the truck and his leg so badly crushed that it was necessary to amputate it.

It would seem well to note in passing that the city of Seattle has not seen fit to introduce evidence in denial of some of the matters brought out in the respondent's evidence. Only two witnesses were called on the part of the city, and they were two police officers, one of whom was the ambulance driver who was sent out to the scene of the accident when it was reported. The only one who seemed to be able to tell anything about what happened was a motorcycle policeman, who testified to having knowledge of the condition of the drive at this place; that he had been down there before on the same afternoon of that accident, and he knew that the hole was

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there. The statements of this witness would tend to show that the truck could not have been going at a very excessive rate of speed, for the car did not appear to be broken up. It is also to be noted that, as to the question of notice, the city did not heed the requests to repair the street, made by the witness Helgeson a few weeks before this accident. It would appear that the city of Seattle, a few weeks prior to the trial of this cause, repaired the driveway at the particular spot in question herein. There was also evidence that other vehicles had overturned at this particular spot, and that a man drove over this same block on East Alder street and his horses were not able to hold back the wagon.

Appellant requested the court to instruct the jury to return a verdict for it, which was refused. Motion was duly made for a judgment *non obstante veredicto*, filed before the entering of any judgment, and a motion for a new trial was duly made. Both of these motions were denied.

Appellant gave nine assignments of error on the part of the trial court, grouped under three points.

I. As to point 1. It has long been the rule of this court that, before a court will be justified in taking from the jury the question of contributory negligence, the acts done must be so palpably negligent that there can be no two opinions concerning them. *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. 799; *Traver v. Spokane St. Ry. Co.*, 25 Wash. 225, 65 Pac. 284. The failure to obey a traffic statute or ordinance is not negligence *per se* unless the complaining party is one for whose benefit the statute or ordinance was enacted. *Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876; *Rampon v. Washington Water Power Co.*, 94 Wash. 438, 162 Pac. 514; *Bogdan v. Pappas*, 95 Wash. 579, 164 Pac. 208. The object of a traffic ordinance or statute regulating speed of vehicles at crossings is to protect pedestrians and other users of the streets, and to avoid collisions. *Rampon v. Washington Water Power Co.*, *supra*.

In the case of *Archibald v. Lincoln County*, 50 Wash. 55, 96 Pac. 531, the court adopts as its view of a correct statement of the law the following instruction which was approved by the Kansas court of appeals in the case of *Falls Township in Chase County v. Stewart*, 3 Kan. App. 403, 42 Pac. 926:

“Knowledge by a person of a defective or dangerous condition of a public highway and the use of it notwithstanding such knowledge are not of themselves negligence. If the necessities of a person’s business require him to use a defective or dangerous highway, he may use it notwithstanding he knows its defects and dangers. Such knowledge only requires an increased caution and diligence to avoid injury. In other words, although a person is required to exercise only ordinary care and prudence, yet such care and prudence must be commensurate with the necessities of the case, and maintain a constant level with the dangers of the situation.”

It is not negligence *per se* to pass over a defective highway when there is no convenient way of going around it. *Einseidler v. Whitman County*, 22 Wash. 388, 60 Pac. 1122. Ordinarily, whether a street is safe is a question for the jury, and their finding will not be disturbed unless absolutely unsupported by the evidence. *Saylor v. Montesano*, 11 Wash. 328, 39 Pac. 653.

Under the facts here, we cannot say that, as a matter of law, the city was not negligent, nor that the respondent was guilty of contributory negligence. Upon respondent’s evidence, he did all he could be expected to do to avoid the defect in the street crossing. The motion for instructed verdict for the city was therefore properly denied.

II. In the claim of damage presented to the city, the negligence of the city in permitting the defective planking, the hole in the intersection of East Alder street and Lakeside avenue, and the precipitous grade from Erie street to Lakeside, was set forth. No mention was made of the wet and slippery condition of the steep grade on East Alder street at the time of the accident, and that condition was shown, over objections by appellant, at the trial. It was stated, however,

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that the grade of the approaching street was precipitous for a distance of one block.

The purpose of the ordinance, in requiring a claimant to file a claim giving notice of the place where the injury is alleged to have occurred and the nature of the defect or omission causing the same, is to enable the city's agents to accurately locate the place of injury and the alleged defects or omissions, and so be informed whether to adjust the claim or prepare its defense thereto.

Of course, the wet and slippery condition of a precipitous approach to a street intersection is presumably not permanent, and is a defect imputable not to the city, but to the phenomena of nature; but it is a condition known to occur, and it is one which the city was bound to consider in relation to surrounding conditions which were under its control, if it had any relation to a situation that might arise from the negligence of the city. *Short v. Spokane*, 41 Wash. 257, 83 Pac. 183.

In the case of *Falldin v. Seattle*, 50 Wash. 561, 97 Pac. 658, Judge Dunbar, in discussing the sufficiency of the description in a claim filed with the city of Seattle under the same charter provision here in question, says:

"This court has uniformly held that requirements of this kind must be reasonable, and that a reasonable compliance with such requirements was all that could be demanded; . . ."

See, also, *Hammock v. Tacoma*, 40 Wash. 539, 82 Pac. 893; *Ellis v. Seattle*, 47 Wash. 578, 92 Pac. 431; *Mulligan v. Seattle*, 42 Wash. 264, 84 Pac. 721; *Lindquist v. Seattle*, 67 Wash. 230, 121 Pac. 449.

Substantial compliance is all that is required. *Short v. Spokane, supra*; *Maggs v. Seattle*, 86 Wash. 427, 150 Pac. 612.

The claim here in question was not misleading, and substantially complied with the ordinance.

III. Appellant's third point contains a discussion of a number of assignments of error involving several propositions, and a group of instructions, requested by appellant and others and given by the court, upon the subject of negligence and contributory negligence.

Appellant requested the following instruction:

"(2) A want of caution to avoid injury, where the duty of use with caution is incumbent, and a reckless or heedless use of dangerous agencies in localities where the peril from their use is obvious, is negligence. The degree of care required in the use and operation of a machine or vehicle upon the streets of a city depends not only upon the condition of the streets, but also upon the dangerous character of the machine or vehicle and its liability to do injury. The more dangerous its character and the greater its liability to do injury, the greater the degree of care and caution required to be used in its use and operation. It is therefore the duty of a person operating an automobile or any other vehicle upon a public highway to use reasonable care in its operation to move it at a rate of speed reasonable under the circumstances and cause it to slow up or stop if need be when the danger is imminent, or could by the exercise of reasonable care be seen or known in time to avoid accident. The person having the management of the automobile is required to use such reasonable care, circumspection, prudence and discretion as the circumstances require, an increase of care being required where there is an increase of danger."

Also:

"(5) If the operator of a machine knows, or in the exercise of reasonable prudence and caution, ought to know the dangers attendant upon the driving of an automobile loaded with freight down a grade of 12 per cent. terminating in a level street, it is his duty to so have his automobile under such control that he could stop it upon the appearance of any danger, it being the rule that the driver of a machine must take notice of the road."

Another instruction was requested as follows:

"(3) If you believe from the evidence that the plaintiff at the time of the accident was running his automobile at



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such a high rate of speed as prevented him from maintaining control of it, such rate of speed was unreasonable, and the plaintiff cannot recover in this action."

Upon the question of contributory negligence, the court gave the following instructions:

"(12) If you find from a fair preponderance of the evidence that Lake Dell place and East Alder street consisted of a series of curves upon a grade reaching from the top of the hill to Lakeside avenue, and if you further find from the evidence that the plaintiff knew of this condition and attempted to descend the hill on those streets with a truck loaded with feed, then I charge you that it was the duty of the plaintiff to exercise a degree of care commensurate with the conditions that he knew existed by reason of the curves and grades, and if you find from a fair preponderance of the evidence that the plaintiff failed to use such care and caution as the curves and grades on said street required him to exercise, and that would be such care and caution as a reasonably prudent person would have exercised under like or similar circumstances, and by the failure to use such care as I have before defined to you, caused or contributed to the injury suffered by the plaintiff, and was the proximate cause thereof, then he cannot recover in this action and your verdict should be for the defendant."

"(9) You are instructed that the affirmative defense contained in the answer of the defendant to the complaint, is the defense of contributory negligence on the part of the plaintiffs, and that contributory negligence on the part of the plaintiffs, if established by the evidence, under the instructions of the court given you in that regard, is a complete defense to the action of such plaintiffs, and precludes any recovery on the part of the plaintiffs, and it is immaterial to such defense, when contributory negligence is established, to what extent the defendant may have been negligent also in the matter. You are also instructed in this regard that contributory negligence is an affirmative defense, and that the burden of proof is upon the defendant alleging it to establish contributory negligence on the part of such plaintiff by a preponderance of the evidence. You are further instructed in this regard that the term 'contributory negligence' as used in these instructions and in the case, is defined and explained to you as follows: Such an act or omission on the

part of the plaintiff, amounting to want of reasonable and ordinary care, as contributing to, or concurring or co-operating with, the negligent act of the defendant, is the proximate cause of the injury and damage complained of, that is, such negligence on the part of such plaintiff as helped to produce the injury and damage complained of."

"(15) You are instructed that if you find that the defendant, the city of Seattle, was guilty of negligence, as alleged in plaintiffs' complaint, which negligence was the direct and proximate cause of the injury that the plaintiff, N. R. Walters, sustained, if any, the plaintiffs will be entitled to recover, even though the plaintiff N. R. Walters at the time he was operating his auto truck down East Alder street may have been guilty of negligence in operating his automobile truck at a rate of speed in excess of the state law, if you further find that the negligence of the plaintiff N. R. Walters, in this regard, was only a remote cause or a mere condition of the accident."

"(16) I instruct you that the violation of a city ordinance is not such negligence as will bar recovery, unless such violation is the proximate cause of an accident. And in this regard I instruct you that, even though you may find that the plaintiff N. R. Walters drove his motor truck around the corner of East Alder street and Lakeside avenue at a rate of speed in excess of eight miles per hour, and in violation of the ordinance of the city of Seattle, yet, if you further find that the speed at which the auto truck was traveling was a remote cause or a mere condition of the accident, as alleged in plaintiffs' complaint, if you find an accident did occur; and if you further find that the defendant was negligent in the way and manner in which it kept and maintained East Alder street and Lakeside avenue at the intersecting point thereof, and the way and manner in which the city kept the lower cross walk, as alleged in plaintiffs' complaint, all of which negligent act or acts, if any, were the direct and proximate cause of the injury that the plaintiff N. R. Walters sustained, if any, then your verdict shall be for the plaintiffs and against the defendant."

It is contended that the last two instructions contradict that part of instruction No. 9 which says, if the negligence of the plaintiff is established, it makes no difference how

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negligent the defendant is, the plaintiff cannot recover; and conflicts with that portion of such instruction which told the jury that, if the negligence of the plaintiff contributed to, concurred, or co-operated with, or helped to produce the damage, it would bar the plaintiff from recovery. We do not so consider them. Instruction No. 12 correctly charged the jury as to the degree of care incumbent upon respondent, and that any omission thereof which caused or contributed to and was the proximate cause of the injury barred recovery. Instruction No. 9 was correct in defining the law of contributory negligence and the burden of proof thereof, and Nos. 15 and 17 are in no way inconsistent therewith, but state the law correctly as stated in the discussion under point No. 1 of this opinion.

It is further contended that instruction No. 12 did not contain the element of potential knowledge, but only instructed as to the necessity of actual knowledge on the part of the respondent as to the defective condition of the road. *Polk v. Spokane Interstate Fair*, 73 Wash. 610, 132 Pac. 401, is cited in support of the view that the court improperly limited the defense to respondent's actual knowledge in the use of the phrase "and plaintiff *knew*;" that respondent was chargeable not only with what he knew, but with what, under the given circumstances, *he should have known*. But the defense referred to in the cited case was the defense of assumption of risk; and the statement of the case shows that the risk referred to was a long standing and dangerous risk of which the respondent in that case either had actual knowledge or, as shown by the circumstances, should have known. Neither is the case of *Zellers v. Bellingham*, 83 Wash. 601, 145 Pac. 613, in point. There it was said that the city, in its exercise of control of the operation of certain machinery and apparatus, was liable either for actual knowledge or constructive knowledge.

The substance of requested instruction No. 5 was given in instruction No. 12, with the exception of the element of what

the respondent *should have known*. There was nothing in the case which made this an element of contributory negligence on the part of respondent, since the testimony is uncontroverted that the respondent had seldom driven down East Alder street and across this street intersection; that he had not been down the street for at least two weeks previous to the day in question, and that the hole in the street crossing was usually filled with water so that its depth could not be determined.

Under the instructions given by the court, the jury were required to ascertain and determine from the evidence what was the proximate cause of the accident; whether it was a defective condition in the street, or the way and manner in which respondent drove his auto truck down East Alder street. The instructions given were correct and were not misleading or confusing. *Bogdan v. Pappas*, 95 Wash. 579, 164 Pac. 208; *Rampon v. Washington Water Power Co.*, 94 Wash. 438, 162 Pac. 514.

The instructions 2 and 5, requested by appellant, are incorrect for the reason that they assume that the automobile in itself was an agency dangerous to the occupant himself. An automobile is not necessarily a dangerous device. It is an ordinary vehicle of pleasure and business. It is no more dangerous *per se* than a team of horses and a carriage, or a gun, or a sail boat, or a motor launch. It is not to be classed with what are commonly called "dangerous instrumentalities," such as ferocious animals, dynamite, gunpowder, and other inherently dangerous contrivances or agencies. While more nearly approximating a locomotive, the ordinary automobile differs materially therefrom. It is not an article or a machine of an inherently dangerous nature. Alone and of itself it will not move, explode, or do injury to any one. Berry, *Automobiles* (2d ed), pp. 17, 19.

The instructions requested further assume that the respondent was chargeable with reckless or heedless use of such dangerous agency in a locality where the peril from its use

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was obvious. None of these assumptions was proper under the case as presented to the court and jury. There was no testimony, except that of respondent himself, as to the manner in which he handled the automobile, and no contradiction of his testimony that, but for the precipitous grade in East Alder street and the defective condition of Lakeside avenue at the street intersection, he could have controlled his car with its load, and the necessary inference therefrom is that there would have been no accident. Upon these questions, the jury found in his favor and, as we consider, under proper instructions as to the law.

Finding no error, the judgment is affirmed.

ELLIS, C. J., PARKER, and MOUNT, JJ., concur.

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[No. 13956. Department Two. August 17, 1917.]

*In re* WEST WHEELER STREET.

NEW ENGLAND LAND COMPANY *et al.*, *Appellants*, v. THE CITY OF SEATTLE, *Respondent*.<sup>1</sup>

MUNICIPAL CORPORATIONS—IMPROVEMENTS—REASSESSMENTS—STATUTES. Under Rem. Code, § 7812, authorizing a reassessment, if any assessment be annulled or set aside by any court or be held invalid for any cause, where a judgment partially annulled an assessment, a reassessment may be made to supply the deficiency created, to the extent of benefits received, and extended over that portion of the original assessment which was not invalidated by the judgment and which is still a valid and subsisting assessment.

SAME—ASSESSMENT FOR BENEFITS—PROPERTY SUBJECT—PRESENT USE. A railroad company cannot object to an assessment of benefits from the opening of a street that the present use of its property was such that it derived no special benefit from the improvement; since the future use of the property may be considered.

FULLETON, J., dissents.

Appeal from a judgment of the superior court for King county, Ronald, J., entered October 24, 1916, confirming a

<sup>1</sup>Reported in 167 Pac. 41.

reassessment roll for a public improvement, after a hearing before the court. Affirmed.

*Donworth & Todd, C. H. Winders, F. V. Brown, and F. G. Dorety* (Charles T. Donworth, of counsel), for appellants.

*Hugh M. Caldwell and Walter F. Meier*, for respondent.

MOUNT, J.—This appeal is from an order of the lower court confirming a reassessment roll, which had been levied by the board of eminent domain commissioners of the city of Seattle upon property of the appellants to provide for a deficiency in an original assessment to pay for land taken for a street in an eminent domain proceeding. The facts are, briefly, as follows: In the year 1911, the city of Seattle, by ordinance, authorized the condemnation of certain real property lying in the vicinity of what is known as Magnolia Bluff, in that city, for the purpose of constructing two roadways thereon. One of these was an overhead roadway connecting property situated on the bluff, and designated as the "highlands," with the main part of the city, while the other was a roadway leading down to the property situated in the valley between Magnolia Bluff and Queen Anne Hill, and referred to as the "lowlands." The cost of condemning the rights of way for these two roadways was assessed against all the property situated on the highlands and lowlands as one improvement district. At the hearing upon the confirmation of the assessment roll, which was prepared in the year 1913, the appellant New England Land Company appeared and objected to the amounts assessed against its property. Notwithstanding the objections, the superior court, on January 15, 1913, entered a judgment confirming the assessment roll as prepared by the board of eminent domain commissioners. Neither of the other two appellants, namely, the Northern Pacific Railway Company or the Great Northern Railway Company, objected to the proposed assessments as returned by the commissioners. From the judgment so entered on January 15, 1913, neither the city of Seattle nor these appel-

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lants appealed. In accordance with that judgment, each of these appellants afterwards fully paid the amounts which became a lien on its property by virtue of that judgment. Other objectors in that proceeding, who owned property on the highlands, appealed to this court from the judgment of January 15, 1913, and were successful in having their assessments reduced, this court holding that these two roadways were two separate and distinct improvements having nothing in common. This court reversed the judgment of the superior court in that case, and remanded the cause

“with instruction to revise the assessment so that the cost of the street which is solely for the benefit of the lowlands shall be assessed thereto and deducted from the assessment upon the highlands and lands not benefited thereby.” *In re West Wheeler Street*, 77 Wash. 3, 137 Pac. 303.

Thereafter, counsel for the city, construing the language there used and the statutes governing appeals as applying only to such specific assessments as had been appealed from, prepared an order revising the assessment roll as to such assessments alone. The court declined to enter that order, but entered an order referring the entire roll to the eminent domain commission to recast the same by omitting from the assessment against all of the highlands the amount which should have been assessed against the lowlands. From that order, the city appealed, and we reversed the order and directed the lower court to enter the order presented by counsel for the city. We there said:

“Construing the language above quoted from the decision of this court on the former appeal with reference to these principles, and especially with reference to the record and the plain mandate of the statute, it is clear that it is in legal effect a reversal of the judgment only as to those properties the owners of which had appealed and could not, and did not, ‘invalidate or delay’ the original judgment as to property concerning which no appeal was taken.” *In re West Wheeler Street*, 85 Wash. 146, 147 Pac. 873.

Thereafter, in 1914, a number of property owners who did not appeal from the original judgment confirming the assessment roll, and who did not institute proceedings in the trial court to vacate or modify that judgment within one year from its entry, brought an action seeking the same relief which was accorded on the first appeal to the property owners who participated in that appeal. The trial court sustained a demurrer to the complaint in that action, and an appeal was prosecuted from that order to this court, and we affirmed the judgment upon the ground that the judgments approving the assessment rolls which had theretofore been rendered were binding upon the appellants and could not, at that late date, be corrected. *Strelau v. Seattle*, 85 Wash. 255, 147 Pac. 1144.

Thereafter an order was entered by the lower court setting aside, annulling, and invalidating the excess of assessments theretofore levied on the property of parties appealing from the original order of confirmation, and the assessment rolls were re-referred to the board of eminent domain commissioners with directions to make a reassessment upon property in the lowlands to provide for the deficiency created by the annulment of the assessments upon the highlands, and to assess this deficiency against the property in the lowlands. After this reassessment was prepared and notice given, a hearing was had thereon, which resulted in an order confirming the reassessment roll. This appeal followed.

A number of assignments of error are made by the appellants, but the principal question in the case is whether the city has statutory authority for a reassessment under the facts here presented. It is conceded by the appellants that the legislature may authorize cities to reassess property benefited by public improvement; but it is argued that the statute does not provide for reassessment under the facts in this case. The statute relating to eminent domain proceedings (Rem. Code, § 7812) is as follows:



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“If any assessment be annulled or set aside by any court, or be invalid for any cause, a new assessment may be made, and return and like notice given and proceedings had as herein required in relation to the first; and all parties in interest shall have the like rights, and the city council or other legislative body, and the superior court, shall perform the like duties and have like power in relation to any subsequent assessment as are hereby given in relation to the first assessment.”

The appellants contend that the original assessment upon the lowlands has neither been annulled nor set aside by any court, and is not invalid for any cause, but that the original assessment is a valid and subsisting assessment, and therefore the reassessment cannot be made to supply any deficiency created by the exclusion of the highlands from the assessment, and a plausible argument is made to the effect that, when the original assessment was levied against the lowlands and these assessments were not appealed from, they became final judgments against each parcel of land to the amount of that assessment, and this position would no doubt be sound if the city or the property owners were seeking to set aside that assessment. But we are of the opinion that the effect of this reassessment is not to set aside or cancel the assessment already made. It is simply a reassessment to supply a deficiency created by the judgment of the court in *In re West Wheeler Street*, 77 Wash. 3, 137 Pac. 303. The statute above quoted says that,

“If any assessment be annulled or set aside by any court, or be invalid for any cause, a new assessment may be made, . . .”

It is argued by the appellants that the original assessment has not been annulled, has not been set aside, and is not invalid, and, therefore, by the terms of the statute quoted, no new assessment can be made. It is no doubt true that the assessment as a whole has not been annulled or set aside, or been held invalid, but the assessment was partially

annulled, set aside, and held invalid in the *West Wheeler Street* case, *supra*. In the case of *Young v. Tacoma*, 31 Wash. 153, 71 Pac. 742, this court had under consideration the power of the city of Tacoma to make a reassessment in a street improvement case. The statute under consideration in that case provided that, when an assessment "has been 'set aside, annulled, or declared void by any court, either directly or by virtue of any decision of such court,' the city may make a new assessment," and it was there held that, where the court had declared a portion of the assessment valid and a portion void, the city was authorized to make a reassessment under that statute. The statute under consideration in that case was in substance the same as the statute under consideration in this case. We there said:

"It will be noted that the decision of the court declares a portion of the assessment valid and a portion void, but we cannot agree with respondents that the record of that case shows an affirmative holding that the original assessment was valid. The validity of the assessment as to any portion of the property is dependent upon its validity as to all the property affected. There is such an interdependent relation between all the property in an assessment district as makes it necessary that the assessment shall be valid as to all the property properly within the district; and, if not so, the whole assessment becomes void. It would be a harsh rule that would require certain property holders to pay an assessment while others equally benefited are permitted to escape that burden. The special fund to be created depends upon such provisions as shall secure the payment of the whole in order to meet the obligations incurred on the faith thereof. There was no actual judgment annulling the original assessment or any portion of it, but there was a decision of a competent court, regularly entered in the cause instituted for that purpose, holding a portion of the assessment void; and, if that decision is to be given any force at all in the premises, for the reasons already stated it must be held that its effect was to declare void the whole assessment. It will be observed that the statute does not require that an actual judgment shall be entered setting aside the original assessment, but if the assessment is declared void, 'either directly or indirectly,

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by virtue of any decision of such court,' it is sufficient to authorize the reassessment. We think the decision mentioned was sufficient to confer jurisdiction for reassessment proceedings under the statute and under the holdings of this court in the following cases: *State ex rel. Hemen v. Ballard*, 16 Wash. 418, 47 Pac. 970; *Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353; *Port Angeles v. Lauridsen*, 26 Wash. 153, 66 Pac. 403."

We think the reasoning in that case is sufficient to show the authority of the lower court, under the statute quoted, to order a reassessment upon the property benefited to the extent of such benefits.

It is also argued by the appellant Northern Pacific Railway Company that the opening of these streets was of no special benefit to its property. It is not claimed, as we understand, that the assessment was arbitrary, but it is claimed that these streets will be of no benefit to the property of the railway company. We have held that the present use of property cannot be made the basis of determining the benefits which may accrue to property. *Seattle v. Seattle & Montana R. Co.*, 50 Wash. 132, 96 Pac. 958.

We think the evidence fairly shows that the eminent domain commission took into consideration the present as well as the future use to which the property might be devoted, and found that there would be a benefit to the property. The trial court, after hearing the evidence, arrived at the same conclusion. We do not find sufficient in the evidence to reverse the finding.

We are of the opinion, therefore, that the judgment of the trial court should be, and it is, affirmed.

PARKER and HOLCOMB, JJ., concur.

ELLIS, C. J., concurs in the result.

FULLERTON, J., dissents.

[No. 14016. Department One. August 17, 1917.]

HERBERT D. JORGENSEN, *by his Guardian etc., Appellant*, v.  
CHARLES C. CRANE, *Respondent*.<sup>1</sup>

**TRIAL—VERDICT—CONSTRUCTION.** In an action for personal injuries, a verdict for the amount of medical and hospital expenses is not a finding of no negligence upon the part of the defendant, where under the instructions no recovery could be had in any amount without a finding of negligence.

**APPEAL—REVIEW—FORMER DECISION AS LAW OF CASE.** A decision on appeal that a verdict for \$363 should be allowed to stand as against a motion for a judgment notwithstanding the verdict is conclusive upon a second appeal from a judgment and verdict for \$362, upon evidence not materially different from that given on the previous trial.

Appeal from a judgment of the superior court for King county, Smith, J., entered January 5, 1917, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a minor while playing with a scraper. Reversed.

*Frank E. Green and L. F. Chester*, for appellant.

*Palmer & Askren*, for respondent.

MAIN, J.—The purpose of this action was to recover damages for personal injuries alleged to have been caused by the negligence of the defendant. The cause has been three times tried in the superior court, and this is the third appeal to this court. Upon the first trial, a judgment of nonsuit was entered. From this, plaintiff appealed, and in 86 Wash. 273, 150 Pac. 419, the judgment was reversed and the cause remanded for a new trial. The cause was again tried in the superior court, and resulted in a verdict in favor of the plaintiff in the sum of \$363. Before the entering of that verdict, the defendant moved for a judgment notwithstanding the verdict. Within the time prescribed by the statute, the

<sup>1</sup>Reported in 167 Pac. 49.

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plaintiff made a motion for a new trial on the ground of inadequacy of the damages as found by the jury. The trial court denied the motion for a judgment notwithstanding the verdict, and granted the motion for a new trial. The defendant thereupon appealed. Upon that appeal, the judgment of the trial court in denying the motion for judgment notwithstanding the verdict and in granting the new trial was affirmed. 92 Wash. 642, 159 Pac. 796. Thereafter, the cause was again tried, and resulted in a verdict in favor of the plaintiff for \$362. The defendant, in due time, having moved for judgment notwithstanding the verdict, this motion was granted, and a judgment entered dismissing the action. From this judgment, the plaintiff appeals.

The facts need not here be detailed, as they are fully stated in the opinions written upon the former appeals. It is not claimed in this case that the evidence as to the negligence of the defendant is materially different from what it was upon the previous trials. In each of the opinions heretofore written in the case, it was held that the evidence was sufficient to carry the question of the defendant's negligence to the jury. It is claimed upon this appeal that, since there was no dispute in the evidence as to the value of the medical services or the hospital expense—these two items aggregating the sum of \$362—a verdict for that sum was in effect a finding on the part of the jury of no negligence, but this conclusion does not necessarily follow. Before the jury could have found a verdict in any amount, there must necessarily have been a finding of negligence. The trial court, after telling the jury that, if they found the defendant to be negligent, and if the defense of contributory negligence was not sustained, a verdict should be rendered in such amount as would compensate the plaintiff for the pain and suffering which he endured, concluded this paragraph in the instructions as follows:

“You will also allow in addition such expenditures or obligations, if any, as you may find plaintiff has incurred

on account of medical or surgical aid, not to exceed \$300, or on account of hospital and nurses' services not exceeding \$62."

Upon the second appeal, where the verdict had been for \$363—only \$1 more than in this case—it was held that the trial court properly denied defendant's motion for judgment notwithstanding the verdict. After holding upon that appeal that a verdict for \$363 should be allowed to stand as against a motion for a judgment notwithstanding the verdict, to now hold a verdict for \$362—\$1 less—on substantially the same evidence, subject to such a motion would, it seems to us, be an attempt to draw a very fine line. The jury in this case made no special findings. It therefore cannot be held that the general verdict is not in harmony with the special finding. The plaintiff not being entitled to recover, either for pain or suffering or for medical attendance and hospital expense, unless negligence was shown, a verdict for \$362 would amount at least to an implied finding on the part of the jury that the defendant was negligent.

The judgment will be reversed, and the cause remanded with direction to the superior court to enter a judgment upon the verdict.

ELLIS, C. J., CHADWICK, and WEBSTER, JJ., concur.

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[No. 14049. Department Two. August 17, 1917.]

MARY C. BLACKWELL *et al.*, Respondents, v. THE CITY OF  
SEATTLE, Appellant.<sup>1</sup>

MUNICIPAL CORPORATIONS—CLAIMS—PRESENTATION BY WIFE. The wife may make and file a claim for personal injuries against a city in her own name, where the husband and wife are living separate and apart and the husband was out of the state and did not return until after the time for filing a claim had expired.

SAME—STREETS—OBSTRUCTING SIDEWALKS—NEGLIGENCE. It is negligence for a city to place a water pipe, an inch or more in diameter, across a sidewalk, without protecting it at night in any way.

SAME—STREETS—OBSTRUCTIONS—CONTRIBUTORY NEGLIGENCE. It is not, as a matter of law, contributory negligence to trip over a water pipe, an inch or more in diameter, left across a sidewalk without protection of any kind.

EVIDENCE—NONEXPERT OPINION—DARKNESS. A nonexpert witness may testify as to whether the degree of darkness was such that plaintiff, injured at night, could not have seen an obstruction on the sidewalk.

WITNESSES — PRIVILEGED COMMUNICATIONS — PHYSICIANS. Under Rem. Code, § 1214, providing that no physician shall be examined as a witness without the consent of his patient, error cannot be predicated upon refusing to require a physician to answer, where the physician claimed the privilege, and counsel stated he would not object in case the physician did not claim the privilege, since no consent was given.

Appeal from a judgment of the superior court for King county, Jurey, J., entered December 9, 1916, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained through a fall upon a sidewalk. Affirmed.

*Hugh M. Caldwell* and *James A. Dougan*, for appellant.

*Howard O. Durk* and *Frank E. Green*, for respondents.

MOUNT, J.—This appeal is from a judgment for \$500, rendered upon a verdict of a jury against the city of Seattle. It appears that the respondent Mrs. Blackwell, on the even-

<sup>1</sup>Reported in 167 Pac. 53.

ing of November 18, 1915, at about 9:30 o'clock, while walking along the west side of Rainier avenue, between Orcas and Findley streets, in the city of Seattle, stumbled and fell over a water pipe placed across the sidewalk. She was injured by the fall. Thereafter she filed a claim against the city and brought an action in her own name. Her husband, at that time, was residing in the state of Oregon, where he had been for a period of two years. When the case came on for trial, it appeared that Mrs. Blackwell was married and not legally separated from her husband. After the defendant had moved to dismiss the case, a request was made to amend the complaint by making the husband a party. The case was thereupon continued and, by stipulation, Mr. Blackwell was made a party plaintiff. The case was afterwards tried to the court and a jury, and resulted in a verdict in favor of the plaintiffs for the amount stated.

The appellant argues that the court erred in denying its motion for a directed verdict, and for judgment notwithstanding the verdict. This argument is based on the fact that the claim for damages against the city was made by the wife alone, the husband not joining therein. The evidence shows, as we have above stated, that, at the time Mrs. Blackwell was injured, her husband was residing in the state of Oregon, while she was residing in the city of Seattle. Her husband had been residing in the state of Oregon for about two years, and did not return to this state until more than sixty days after the injury. In the meantime, Mrs. Blackwell made and filed the claim for damages against the city. There was no legal separation, but there was an actual living apart at the time of the injury to Mrs. Blackwell. The question presented here was made in the case of *Davis v. Seattle*, 37 Wash. 223, 79 Pac. 784. After some consideration of the question, we there said:

"We fail to see why a wife might not, on behalf of the community, present a claim for damages based upon personal injuries sustained by herself."



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We think that is decisive of the question presented here, especially where the husband is without the state when the injury occurs and does not return until after the time when the claim is required to be made and filed, as was the case here.

Appellant further argues that the respondent was guilty of contributory negligence, as a matter of law, and, for that reason, the court should have directed a verdict in favor of appellant. The facts testified to on behalf of the respondents are, in substance, that Mrs. Blackwell, at the time of her injury, lived upon Rainier avenue, north of Findley street; at that time, Rainier avenue was being improved; the sidewalks along the street were intact and were not closed; pedestrians were permitted to travel upon the sidewalks. Mrs. Blackwell had not been to her home for about a week. A water pipe, an inch or more in diameter, connecting with a store, had been run across the sidewalk. This pipe was an inch or more above the walk. Mrs. Blackwell and others testified that the place upon the sidewalk where the water pipe was placed was shaded, so that the pipe was not plainly visible; that, while she was walking along the sidewalk hurriedly, not seeing the pipe, she caught her foot under it, and was thrown upon the sidewalk and injured. It is argued by the appellant that, if Mrs. Blackwell did not know the water pipe lay across the sidewalk, she should have observed it, and was therefore guilty of contributory negligence. Ordinarily, a person traveling upon a sidewalk which is open for public travel is not required to examine it critically, but may use the same in the customary way for ordinary travel. A water pipe, an inch or more above the surface of a sidewalk, in the nighttime, especially where it is shaded, may not be observed by a pedestrian. It is clearly negligence for the city to place such an obstruction on a sidewalk without protecting it at night by a light or in some other way. We think it cannot be said, as a matter of law, to be contributory negligence when one who is walking along

a sidewalk in the ordinary way trips over a water pipe, an inch in diameter, which is placed an inch above such walk. We are satisfied that the question of contributory negligence was one of fact for the jury, rather than one of law for the court. *Welch v. Petley*, 89 Wash. 254, 154 Pac. 145; *Lauteschlager v. Seattle*, 77 Wash. 12, 137 Pac. 323.

A witness by the name of Roy Jones was asked this question:

“Was the darkness, the degree of darkness then such that one who didn’t know that the pipe was there could not have seen it?”

The witness was permitted to answer this question to the effect that he did not think one would have seen it. It is argued by the appellant that the court erred in permitting the witness to answer this question; first, because there was no evidence that Mrs. Blackwell did not know of the existence of the pipe; and second, because the witness Jones was not qualified as an expert to answer that question. We think there is no merit in either of these contentions. Mrs. Blackwell testified that she did not know of the existence of the pipe. The question whether the degree of darkness was such that one who did not know the pipe was there could have seen it, was not a question which required expert evidence. Any person may testify concerning the degree of darkness, and we think such evidence does not fall within the rule of expert opinions.

Dr. E. C. Lanter was called as a witness on behalf of the appellant. He testified that, about a year before the accident happened, he had professionally treated Mrs. Blackwell. The doctor was then asked to describe her condition in the year 1914. The respondents’ counsel objected to this question upon the ground that it was irrelevant and immaterial, and also stated that they had a right to object to it upon the ground that the relations between the witness and Mrs. Blackwell were confidential, but that, if the doctor desired to violate that confidence, respondents would not object

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on that ground. Thereupon the court told the doctor that, if he felt he was violating a professional confidence, he had a right to refuse to testify. The doctor thereupon declined to testify, and appellant now argues that, because the respondents' counsel did not object to the testimony on the ground of privilege, the court should have required the doctor to answer the question. Section 1214, Rem. Code, provides that no physician shall be examined as a witness without the consent of his patient. No consent is given here, and clearly it was not the duty of the court to have required the doctor to testify under the circumstances. *Noelle v. Hoquiam Lumber & Shingle Co.*, 47 Wash. 519, 92 Pac. 372.

We find no error in the record, and the judgment is therefore affirmed.

ELLIS, C. J., HOLCOMB, FULLERTON, and PARKER, JJ., concur.

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[No. 14082. Department One. August 17, 1917.]

*In the Matter of the Guardianship of HENNING MARTIN  
ANDERSON et al.*<sup>1</sup>

CONTEMPT—EVIDENCE—SUFFICIENCY. Where, upon a hearing for settlement, a guardian admitted that he had the money due his ward in a safe-deposit box, he is guilty of contempt in refusing to pay it over on the judgment entered requiring him to do so; and it is no excuse that the guardian's brother had raised the money and subsequently refused to allow it to be drawn upon, where no intimation of such fact was made at the hearing.

SAME—POWERS OF COURT—IMPRISONMENT. Where a guardian was in contempt for failing to pay over money to his ward, as required by a judgment, the court has jurisdiction to adjudge the contempt and commit him to the county jail until the order is complied with.

SAME—PROCEEDINGS—PARTIES. A contempt proceeding against a guardian for failure to comply with an order to pay money need not be prosecuted in the name of the state.

Appeal from an order of the superior court for King county, Smith, J., entered September 20, 1916, adjudging

<sup>1</sup>Reported in 167 Pac. 70.

a guardian to be in contempt of court, after a hearing upon a show cause order. Affirmed.

*Walter B. Allen*, for appellant.

*Saunders & Nelson*, for respondents.

MAIN, J.—This is an appeal from an order of the superior court adjudging John Kalberg to be in contempt thereof for his failure to pay over to Albin Elmer Anderson, for whom Kalberg had been guardian, the sum of \$1,250.

The facts are these: On September 27, 1909, Kalberg was appointed guardian for Henning Martin Anderson and Albin Elmer Anderson, and there came into his possession, as such guardian, the sum of \$2,289.50, belonging to the minors in equal proportions. This appeal is only concerned with the estate of Albin Elmer Anderson, who, on the 6th day of July, 1916, became of age. Soon after this time, the guardian caused a report of his doings as such to be prepared and filed. Subsequently, objections to this report were presented, and the cause came on for hearing on the 7th day of August, 1916. This trial resulted in a judgment to the effect that the guardian owed his ward the sum of \$1,390.85. During the hearing upon the final account, which resulted in the judgment indicated, the following occurred while Kalberg was upon the witness stand:

“Q. And you are ready and able to make settlement now with the younger man (Albin Elmer Anderson)? A. Yes, sir. Q. Now, on July 6, 1916, when Albin Anderson became of age, you had no money whatever in the First State Bank, did you? A. No, sir. Q. Nor in any other bank? A. Now I don't know what to say about that. I might have had money in other banks, but I don't know why that should be gone into, what I had in other banks. Now as far as having the money, if that is what you are driving at, I didn't have it. Q. You didn't have it on July 6, 1916? A. No, I didn't, but I raised it afterwards. I didn't— Q. By the way, it is now said that you have \$1,196.61 without any interest on it. Have you got that now? A. I have got more than that. Q.

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Where is it? Mr. Allen: I have it in a safe-deposit in cold cash. Mr. Saunders: I would like to have it here. The Court: If he says that he has it I presume that will be sufficient. If the order of the court is made on this and he does pay it— Mr. Allen: Before I had him file that report I had the money put up in cash and I have it now in the safe-deposit box, and it was there when this account was first brought up for hearing before Judge Dykeman. I had it at that time in my pocket in the court house and it is now in the safe-deposit box. The Court: Very well. Q. Where did you get that money that you turned over to your lawyer? Mr. Allen: I object to that. I don't think it is material. The Court: I don't think the source of it is material. If he actually has the money coming to the younger boy he is prepared. I don't think it is material as to the source from which he gets it as long as it is on hand for that purpose . . . Q. When the young man became of age on the 6th of this month, did you go into your attorney's office and tell him to prepare the account and get it ready, or within just about that time? A. Yes, after he had seen me, of course. . . . Q. And before you filed this account that we have got in here now you went out and got the money did you not, \$1,250? A. Yes, sir."

After the judgment entered on August 24, 1916, in which it was found that the guardian was indebted to the ward in the sum of \$1,390.85, neither the \$1,250, which the guardian testified upon the hearing that he had, and which his counsel assured the court was in a safe-deposit box, nor any other sum, was paid to the ward. On the 24th day of August, 1916, the ward applied to the court for an order, directed to the guardian, requiring him to show cause why he should not pay over to the ward the \$1,250 mentioned. This application was supported by an affidavit. On the same day, an order to show cause was issued, returnable on the 29th day of August, 1916. The hearing upon the show cause order was held on the 5th day of September, 1916, and Kalberg was directed to forthwith "pay over to said Albin Elmer Anderson the said sum of \$1,250 on or before the 15th day of September, 1916, and the said matter of contempt to be

continued to said last mentioned date; . . .” The money was not so paid over, and on September 20, 1916, an order was entered committing Kalberg to the county jail until such time as he should turn over to the ward the \$1,250. It is from this order that the appeal is prosecuted.

It is first contended that, under the findings in the judgment entered upon the final account, the guardian is not subject to be committed for contempt, but this contention is not well founded. Upon the hearing which resulted in that judgment, the guardian testified that he had \$1,250 which he could pay over, and his counsel assured the court that it was in the safe-deposit box. That the guardian may have previously commingled the ward's funds with his own and had subsequently become insolvent, if such be the fact, would not excuse the failure to turn over the \$1,250 which it was claimed upon the hearing that he then had.

It is next claimed that the guardian cannot be adjudged guilty of contempt if it were beyond his power to make the payment at the time ordered so to do. The excuse offered for failure to comply with the order was that the \$1,250 had been raised by the guardian's brother, but that, subsequent to the hearing upon the final account, the brother had withdrawn the money and refused to allow it to be paid over. The fact that the brother had any claim to the money, or had anything to do with the raising of the amount thereof, was not called to the attention of the court upon the hearing. On the contrary, the court was given to understand that the money was readily available and would be immediately paid over when the judgment was entered. Had not this been the understanding of the trial judge, he undoubtedly would have directed the money to be brought into court when the ward's counsel suggested that this be done. The excuse offered for failure to turn over the money was not sufficient.

It is next claimed that the failure of the guardian to pay over the money was not brought to the attention of the court by affidavit. The record shows that the ward filed an

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affidavit in support of his application for a show cause order, and upon the hearing on the return thereto, the guardian was directed to forthwith pay over the money before a certain date, and the cause was continued to that date. Under these facts, there can be no merit in the claim that the facts shown to the court constituting the contempt were not made to appear by affidavit.

There seems to be some claim that the court was without power to enter the order adjudging the guardian to be in contempt and committing him to the county jail until the order should be complied with. This question is fully discussed in *State ex rel. Sargent v. Superior Court*, 71 Wash. 495, 128 Pac. 1077, and under the holding in that case the trial court had the power to make the order.

The final contention is that the contempt proceeding is defective because it is not brought in the name of the state, but this contention is without merit, as will be seen by an examination of the cases of *Poland v. Poland*, 68 Wash. 597, 116 Pac. 2, and *Wright v. Suydam*, 79 Wash. 550, 140 Pac. 578, in which cases the question is fully considered and determined adversely to the contention here made.

The judgment will be affirmed.

ELLIS, C. J., CHADWICK, MORRIS, and WEBSTER, JJ.,  
concur.

[No. 14114. Department One. August 17, 1917.]

*In the Matter of the Guardianship of HENNING MARTIN  
ANDERSON et al.*<sup>1</sup>

**GUARDIAN AND WARD—TRANSACTIONS BETWEEN—CONVERSION—LOAN TO GUARDIAN.** Where a guardian had converted and misappropriated a fund due to his ward, and his account was unbalanced, it will not be held that the ward, on coming of age, "loaned" the money to the guardian, irrespective of an agreement to that effect, under the rule that such transactions are scrutinized with great care; since there was no fund to loan.

**LIMITATION OF ACTIONS — FRAUD — DISCOVERY — ACTION BY WARD.** Where a guardian, having converted the funds of his ward, contrived to "borrow" the sum of him at final settlement, the statute of limitations does not run against the ward until three years after discovery of the fraud.

**GUARDIAN AND WARD — COMPENSATION — DEFAULTING GUARDIAN.** Where a guardian converted and misappropriated the fund belonging to his ward, he should be denied compensation, there being no ex-cusatory facts.

**SAME—ACCOUNTING—CONVERSION—INTEREST.** Where a guardian used the funds of his ward for his personal use, keeping no account, he is liable for interest, regardless of the fact that he made no profit.

Appeal from a judgment of the superior court for King county, Smith, J., entered August 9, 1916, denying a discharge and final settlement of the account of a guardian, after a hearing before the court. Affirmed.

*Walter B. Allen*, for appellant.

*Saunders & Nelson*, for respondents.

**MAIN, J.**—John Kalberg was appointed guardian of the estates of Henning Martin Anderson and Albin Elmer Anderson, minors, on September 27, 1909. Henning Martin Anderson became of age on May 22, 1911. On February 2, 1912, Kalberg filed an account showing \$1,221.61 due his ward. The ward admitted the correctness of the account. It was approved by the court, after allowing an attorney's

<sup>1</sup>Reported in 167 Pac. 71.



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fee of \$25, for the sum of \$1,196.61. The amount due was not paid over.

The younger ward became of age July 6, 1916. Kalberg filed another account reciting the proceeding; that his account with Henning Martin Anderson had been approved; that the amount due Albin Elmer was \$1,196.61 less attorney's fees to be allowed by the court and cost of a surety bond; that he had in his previous account credited himself with \$213 interest on the whole estate, but had not since the filing thereof credited himself with interest because he had received no interest, and that he had been allowed no compensation. He prayed that he be allowed costs, compensation and a certain sum advanced to Henning Martin Anderson, aggregating the sum of \$386.61, and that his account be approved.

The wards objected to the allowance of the account, claiming that the gross amount due the joint estate was \$2,289.50, with interest at the legal rate from September 27, 1909; that the estate had been misappropriated and converted to the use of the guardian, and praying that the discharge of the guardian be withheld until the full payment of the amount theretofore found to be due Henning Martin Anderson.

The guardian answered, denying any conversion of the fund and alleging that, after the time of the settlement of his account, Henning Martin Anderson had loaned him personally the amount found to be due, and that any amount that might be owing was owing from him as an individual; that three years had elapsed from the time of the settlement of the account and the loaning of the money, and that the claim was barred under the statute of limitations.

The court found against the guardian upon all the issues, finding that Henning Martin Anderson was entitled to recover the net sum of \$1,025.38, and that Albin Elmer Anderson was entitled to recover the net sum of \$1,390.85. No compensation was allowed, and interest was charged from the time of the appointment. Kalberg appeals.

We have reviewed the record and find that the charge of misappropriation and conversion of the fund is sustained. We have one question of mixed law and fact and one of law. First: Whether Henning Martin Anderson loaned the amount found to be due him on February 2, 1912, to his guardian, and if so, whether his claim is barred by the statute of limitations.

Kalberg testifies that he borrowed the money. Aside from Kalberg's own testimony, his whole case depends upon the testimony of one or more witnesses who testify that the boy told them that he had loaned his money to Kalberg. He admits that he so stated to these witnesses. We can admit the truth of all that Kalberg and his witnesses testify to and still find there was no loan.

Transactions between guardian and ward are scrutinized with great care.

"Knowing the powerful influence which a guardian has over his ward, especially when the whole estate of the ward is in the hands and control of the guardian, courts of equity have ever regarded with jealous watchfulness all transactions between guardian and ward, and where such position of influence is strengthened by the fact of intimate relationship existing between the parties, greater reason exists for the strict adherence to the rules above announced. Whenever a transaction between guardian and ward which is prejudicial to the interest of the latter is brought under the scrutiny of a court of equity, there is a strong presumption that the transaction resulted from the undue influence which the guardian is presumed to have over the ward, and the law casts the burden of proof upon the guardian to establish to the satisfaction of the court that the act proceeded from the independent and uninfluenced will of the ward." *Baum v. Hartmann*, 226 Ill. 160, 80 N. E. 711, 117 Am. St. 246.

See, also, *Williams v. Davison's Estate*, 133 Mich. 344, 94 N. W. 1048; *Harrison v. Harrison*, 21 N. M. 372, 155 Pac. 356, L. R. A. 1916E 854; *Daniel v. Tolon* (Okl.), 157 Pac. 756; 12 R. C. L. 61; Schouler, Domestic Relations, § 387.

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This rule is applied without relaxation in the settlement of accounts. *Baum v. Hartmann, supra*; 21 Cyc. 169-F; Schouler, Domestic Relations, § 388. And even the fact that the ward has attained his majority at the time of settlement will not be sufficient to exempt the guardian from its operation. *Baum v. Hartmann, supra*.

"The rule is elementary that, even after the ward attains majority and the guardian's accounts have been settled, while the disability of infancy has been removed, that arising from the trust relation is but slightly diminished, and contracts between the guardian and ward are scrutinized with the utmost care and caution, and, if the guardian derives a benefit or the ward suffers a loss by the transaction, it will not be sustained if the court is convinced that there is lacking the element of the utmost fairness and good faith." *Williams v. Davison's Estate, supra*.

To make a loan there must be a fund presently available to the lender. To say that a guardian who had converted and dissipated a fund could conceal his malfeasance under the cloak of a loan, although it were so understood in terms, would be a travesty upon justice. The ward made no loan because there was nothing to loan. The guardian borrowed nothing because there was nothing to borrow. His account stands as an unpaid balance. While the courts have applied the statute of limitations to transactions between guardian and ward, they have not lost sight of the equities of the case where the controlling statute provides that an action shall be commenced within three years after the fraud is discovered. *Wickham v. Sprague*, 18 Wash. 466, 51 Pac. 1055. Certainly the ward should not be held to the discovery of the fraud practiced upon him at the very time his guardian was practicing an active deception and concealing his defalcation under the pretense of borrowing a nonexistent fund.

Second: Compensation is usually denied a defaulting guardian. The decree is amply justified in this case. *Hudleston v. Henderson*, 181 Ill. App. 176; Woerner, American Law of Guardianship, § 357. No excusatory facts are

plead or proved to relieve the malfeasance of the guardian, and it follows that the loss to his ward is not to be enhanced by a profit which ought to rest upon the legal ground of a service measurable in fidelity and loyalty to the trust.

The guardian complains because the court found that he had converted the share of Albin Elmer Anderson at a time prior to the time he filed an account showing the amount due Henning Martin Anderson, and was then and is now unable to pay the amount, and because of this delinquency has been charged interest. The testimony shows that no account of the estate was ever kept; that the money was placed to the personal credit of the guardian and used by him and by at least two firms in which he was a partner in the prosecution of personal and private enterprise. Kalberg failed in business and, at the time the elder ward became of age, was utterly without means of his own. He took the fund expecting to profit by its use. Surely the law will not allow compensation, nor permit him to say that he should not pay interest because he failed in his enterprises and for that reason received no profit. To do so would make the ward assume the hazards attending private enterprises. It would be to say generally that a debtor is excused from the payment of interest if his speculation fails.

“Should the guardian employ the fund in purposes of his own, seeking to make profit for himself (apart from any question of fraud that may arise) there is in such case no such labor performed, or skill exerted in behalf of the ward that needs to be compensated.” *Burke v. Turner*, 85 N. C. 500.

The finding of the court rests upon the testimony of the guardian himself, and this court will not refine the law to the point of technicality to relieve him of a state of facts of his own making.

Judgment affirmed.

ELLIS, C. J., MORRIS, WEBSTER, and CHADWICK, JJ., concur.

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Opinion Per FULLERTON, J.

[No. 14126. Department Two. August 17, 1917.]

H. V. ROMINGER *et al.*, *Appellants*, v. C. H. NELLOR,  
*Auditor of Skamania County, Respondent.*<sup>1</sup>

OFFICERS—RECALL—PETITION—WITHDRAWAL. Electors signing a petition for the recall of a county commissioner have the right to withdraw their names prior to the date fixed by the county auditor for canvassing the names.

SAME—RECALL—PETITIONS — WITHDRAWAL OF NAMES — DUTY OF AUDITOR. Petitions withdrawing the names of electors from a recall petition must be considered although the names were not initialed by the registration officers as required on the recall petitions, it being necessary only that the auditor satisfy himself that the person purporting to withdraw is the elector who signed the original petition.

Appeal from a judgment of the superior court for Skamania county, Darch, J., entered February 15, 1917, denying a writ of mandamus to compel the county auditor to count the names of signers withdrawn from recall petitions. Affirmed.

*H. W. Arnold*, for appellants.

*E. E. Shields* and *Miller & Wilkinson*, for respondent.

FULLERTON, J.—This is an appeal from a judgment of the superior court of Skamania county, refusing an application for a writ of mandate. The facts which gave rise to the controversy are, in substance, these: On May 27, 1916, the appellants filed with the respondent, as county auditor of Skamania county, formal written charges against one of the county commissioners of the county named, averring therein that the commissioner had been guilty of malfeasance and misfeasance in office and guilty of violating his oath of office, stating the acts of misconduct with sufficient detail to comply with the requirements of the statute relating to the recall and discharge from office of county officers by a special election. Subsequently such proceedings were had pursuant to the statute as to result in the filing of petitions with the respondent auditor containing a sufficient number of names of the qualified voters of the county to require that

<sup>1</sup>Reported in 167 Pac. 57.

officer to call a special election for the purpose indicated. The petitions were filed with the auditor on November 6, 1916, and on that date he notified the appellants that he would proceed to canvass the petitions on Wednesday, November 15, 1916. Between the date of filing the petitions and the date fixed by the auditor for canvassing the same, certain of the signers of the petitions filed other petitions addressed to the county auditor, directing him to withdraw their names from the recall petitions and not to count them in making the canvass of the petitions. On making the canvass, over the objection of the appellants, the auditor refused to count the persons who had indicated their purpose to withdraw, the result being that an insufficient number of signatures was left thereon to authorize the calling of the special election. The auditor made a certificate to that effect and notified the appellants, as filers of the petition, of his action. The proceedings in mandate before indicated were thereupon instituted.

The first question presented is whether electors, after having signed a petition for the recall and discharge from office of an elective officer, can withdraw from the petition and thereby prevent their names from being counted as electors favoring the recall. The learned counsel for the appellants has presented an argument in favor of the negative of the proposition, in which the reasons sustaining that view are ably and persuasively set forth. We shall not, however, attempt an answer in detail. This court is committed to the other view. In *State ex rel. Mohr v. Seattle*, 59 Wash. 68, 109 Pac. 309, we had before us the question of the right of an elector to withdraw from a referendum petition. We upheld the right, saying it was sustained by the better reason and by the overwhelming weight of authority. The court also quoted with approval from the case of *County Court of De Kalb County v. Pogue*, 115 Ill. App. 391, a case involving the right to withdraw from a petition asking that an election be called at which the question of the removal of a

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county seat could be submitted, where the reasons for the rule were stated in the following language:

"Signatures to such petitions are easily obtained. Ordinary experience teaches that, in matters which do not seem closely to touch themselves, many persons sign petitions without sufficient consideration and inquiry, and if the subject afterwards becomes a matter of public discussion so that their attention is carefully drawn to the reasons for that for which they have petitioned, they often then conclude that they have been hasty in signing, or are in error, or that they do not wish the petition granted. In the case before us, the signatures were purely voluntary. The signers received no consideration for joining in the petition. The petition contained no promise of any kind. The rule governing mutual subscriptions of money is not applicable. One signature was not a consideration for another signature. What good reason is there why one who has changed his mind since signing such a petition, and who concludes that either the public good or his own interest is not in harmony with the petition, may not recede from his signature before action taken thereon? The rule which permits a withdrawal at any time before final action upon the petition is much more likely to get at the real and mature judgment of the voters, and it is calculated to discourage a hasty presentation of a petition for signatures without a full disclosure of the real merits of the question."

In the opinion, moreover, it was shown that the right of withdrawal had been recognized in a variety of instances, such, for example, as petitions for the sale of intoxicating liquors, petitions for changing or removing county seats, petitions for the organization of turnpike companies, petitions for the establishment of public roads, petitions for public improvements, petitions for the sale of bonds, petitions for local option elections, and petitions for disincorporating towns. To these we may add petitions for the recall of public officers (*Hay v. Dorn*, 93 Kan. 392, 144 Pac. 235), and petitions to establish a commission form of government (*Stockard v. Roswell*, 16 N. M. 340, 117 Pac. 846, 35 L. R. A. N. S. 1113).

There can be no difference in principle between the cited case and the case at bar. If the right exists to withdraw from a petition asking that an ordinance of a city be referred to the electors of the city, it exists to withdraw from a petition asking that an election be called to determine whether a county officer shall be recalled and discharged from office.

Another question is the timeliness of the withdrawals. It will be seen from the facts stated that the withdrawal petitions were filed with the auditor after the filing of the original petitions but before he had commenced a canvass of the same, and it is contended that the withdrawal petitions should have been filed before or along with the original petitions. The reason usually given for requiring a timely filing of the withdrawal petitions is that there may be no unnecessary delay in the proceedings. But this reason does not support the appellants' contention. By the provisions of the statute, the auditor must fix a time at which he will commence a canvass of the petition, and no delay in the canvass will be caused by recognizing withdrawals filed prior to that time, whether filed before or after the filing of the original petitions.

Finally, it is contended that the withdrawal petitions should not have been considered because the names thereon were not initialed by the registration officers as required of signatures on the recall petitions. But the purpose of requiring that the signatures be thus initialed was to insure that the signers of the petitions are legal electors of the county. No purpose would be served by requiring that the signatures be initialed a second time. The auditor, before he recognizes a withdrawal, must satisfy himself that the person purporting to withdraw is the elector who signed the original petition. This he may do from such evidence as will satisfy his conscience; he is not confined to any particular form of proof.

The judgment is affirmed.

ELLIS, C. J., MOUNT, HOLCOMB, and PARKER, JJ., concur.



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[No. 13258. Department One. June 20, 1917.]

ROGER MARCHETTI, *Respondent*, v. SAN FRANCISCO OYSTER HOUSE.  
*Appellant*.<sup>1</sup>

Appeal from a judgment of the superior court for King county, Smith, J., entered April 2, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

*Tucker & Hyland*, for appellant.

PER CURIAM.—Roger Marchetti, the plaintiff, brought an action against the defendant corporation, San Francisco Oyster House, basing his cause of action upon a contract of employment evidenced by the record of a resolution entered in defendant's minute book, as follows:

"Resolved, that Roger Marchetti be employed as counsel for the company, and that he receive for his services as secretary and counsel of the company the sum of \$25 per month."

This minute was signed by Jack Barberis, president, and by Roger Marchetti, secretary, those two being the only stockholders and officers in the corporation, Barberis holding ninety-nine shares and Marchetti one share.

The plaintiff claimed the sum of \$725 for salary and \$91.05 for advances made the defendant, less payments received in the sum of \$141.25, leaving a balance due plaintiff of \$674.80. The defendant answered there was but \$275 due plaintiff on account of salary, inasmuch as he had been discharged after a service of eleven months, on which defendant should be credited in the sum of \$211 for moneys paid plaintiff. By way of cross-complaint, defendant alleged plaintiff was indebted to it in the sum of \$212.10 for meals, board, and room, in the sum of \$86 for moneys converted, and in the sum of \$5 for money loaned. The reply admitted the indebtedness of plaintiff for the item of \$86, but denied all other allegations of the cross-complaint. On the trial the plaintiff admitted the counterclaim of \$212.10 for meals furnished. The cause was tried to a jury, which returned a verdict in favor of plaintiff for \$216.40.

The defendant appeals, assigning as error, first, the denial of its motion for an instructed verdict for defendant; and second, the giving of the following charge to the jury:

"It will first be your duty to determine whether or not there was a contract made between the plaintiff and defendant corporation in the month of December, 1911. If you determine there was such a contract made, what was that contract? Was it a contract as claimed by the plaintiff at \$25 for services as secretary and attorney

<sup>1</sup>Reported in 165 Pac. 657.

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for the corporation and not terminable at any agreed time whatever? Or, if there was a contract made for a period not to exceed one year?"

We do not find any error in the record under these assignments. There was sufficient evidence to carry the case to the jury, and the instruction was proper under the issues and evidence in the case.

The judgment will be affirmed.

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[No. 12560½. Department Two. July 16, 1917.]

**THE STATE OF WASHINGTON, Respondent, v. MOUNTAIN TIMBER  
COMPANY, Appellant.<sup>1</sup>**

Appeal from a judgment of the superior court for Cowlitz county, Darch, J., entered September 22, 1914, in favor of the plaintiff, upon overruling a challenge to the evidence. Affirmed.

*Edmund C. Strode, Imus & Gore, and Coy Burnett*, for appellant.

*The Attorney General and John M. Wilson, Assistant*, for respondent.

**PER CURIAM**—This case involves the same issues as those presented in *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645, which was taken to the supreme court of the United States upon writ of error. In a recent decision by that court (*Mountain Timber Co. v. State of Washington*, 243 U. S. 219) the decision of this court was affirmed. For the reasons stated in both cases, above referred to, the judgment herein is affirmed.

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[No. 13425½. *En Banc*. July 17, 1917.]

**EVERETT RAILWAY, LIGHT & WATER COMPANY et al., Appellants, v. THE  
CITY OF EVERETT et al., Respondents.<sup>2</sup>**

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered November 18, 1915, dismissing an action to restrain the enforcement of an ordinance, upon sustaining a demurrer to the complaint. Reversed.

*J. A. Coleman and James M. Hogan*, for appellants.

*Wm. A. Johnson*, for respondents.

**PER CURIAM**.—This case is in all respects the same as that of *Pacific Tel. & Tel. Co. v. Everett*, ante p. 259, 166 Pac. 650, with the exception that the ordinance granting the franchise is not set out in full in the complaint. The respondents seek to differentiate it by the contention that the description of the franchise as epitomized in

<sup>1</sup>Reported in 165 Pac. 971.

<sup>2</sup>Reported in 166 Pac. 655.

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the complaint contains nothing which is in any wise affected by the license tax imposed by the charter and ordinance set forth in the case cited. But, in our opinion, sufficient is alleged to show the nature of the franchise under which the appellant is acting, and that its terms would be infringed by the imposition of the charge imposed by the charter and ordinance. For the reasons stated in the case cited, the judgment is reversed with instructions to overrule the demurrer.

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[No. 13654. *En Banc*. July 17, 1917.]

PUGET SOUND INDEPENDENT TELEPHONE COMPANY, *Appellant*, v. THE CITY OF EVERETT *et al.*, *Respondents*.<sup>1</sup>

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered December 6, 1915, dismissing an action to restrain the enforcement of an ordinance, upon sustaining a demurrer to the complaint. Reversed.

*Coleman & Fogarty* and *Q. A. Kaune*, for appellant.

*Wm. A. Johnson*, for respondents.

PER CURIAM.—The question presented in this case is, in all of its essential particulars, the same as that presented in the case of *Pacific Tel. & Tel. Co. v. Everett*, ante p. 259, 166 Pac. 650, and is controlled thereby. For the reasons given for the reversal of that case, the judgment is reversed and the cause remanded with instructions to overrule the demurrer.

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[No. 13161. *En Banc*. August 2, 1917.]

R. H. MARTIN, *Appellant*, v. JOHN G. CUNNINGHAM, *Respondent*.<sup>2</sup>

Appeal from a judgment of the superior court for Spokane county, Clifford, J., entered March 19, 1915, upon granting a nonsuit, dismissing an action for malpractice, tried to the court and a jury. Affirmed.

*F. A. McMaster*, for appellant.

*Harry L. Cohn* and *Cannon & Ferris*, for respondent.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the opinion heretofore filed herein as reported in 93 Wash. 517, 161 Pac. 355, and for the reasons there stated, the judgment is affirmed.

<sup>1</sup>Reported in 166 Pac. 655.

<sup>2</sup>Reported in 166 Pac. 793.

[No. 13503. *En Banc*. August 6, 1917.]

N. E. TOLER, *Respondent*, v. NORTHERN PACIFIC RAILWAY COMPANY,  
*Appellant*.<sup>1</sup>

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered January 27, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a locomotive fireman. Reversed.

*C. H. Winders*, for appellant.

*Govnor Teats, Leo Teats, and Ralph Teats*, for respondent.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the opinion heretofore filed herein as reported in 94 Wash. 360, 162 Pac. 538, and for the reasons there stated, the judgment is reversed with instructions to dismiss.

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[No. 13643. *En Banc*. August 7, 1917.]

ANNE JENSEN, *Respondent*, v. ALFRED LAWRENCE, *Appellant*.<sup>2</sup>

Appeal from a judgment of the superior court for King county, Frater, J., entered April 26, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

*Farrell, Kane & Stratton*, for appellant.

*John H. Perry*, for respondent.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the opinion heretofore filed herein as reported in 94 Wash. 148, 162 Pac. 40, and for the reasons there stated, the judgment is affirmed.

<sup>1</sup>Reported in 166 Pac. 778.

<sup>2</sup>Reported in 166 Pac. 793.

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[No. 13682. *En Banc*. August 7, 1917.]

Z. A. SCOUSE *et al.*, *Appellants*, v. ALASKA & YAKIMA INVESTMENT COMPANY *et al.*, *Respondents*.<sup>1</sup>

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered July 29, 1916, in favor of the defendants, dismissing an action to subject real property to the satisfaction of a judgment, tried to the court. Affirmed.

*Willett & Oleson*, O. L. Willett, and *Englehart & Rigg*, for appellants.

H. J. Snively, for respondents.

## ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the opinion heretofore filed herein as reported in 94 Wash. 250, 161 Pac. 1189, and for the reasons there stated, the judgment is affirmed.

[No. 13464. *En Banc*. August 8, 1917.]

THE STATE OF WASHINGTON, *on the Relation of Puget Sound & Willapa Harbor Railway Company*, *Appellant*, v. NORTHERN PACIFIC RAILWAY COMPANY *et al.*, *Respondents*.<sup>2</sup>

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered April 17, 1916, affirming an order of the public service commission, after a hearing before the court. Reversed.

F. M. Dudley, for appellant.

George T. Reid, J. W. Quick, and L. B. da Ponte, for respondent Northern Pacific Railway Company.

The Attorney General and Scott Z. Henderson, Assistant, for respondent Public Service Commission.

## ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the opinion heretofore filed herein as reported in 94 Wash. 10, 161 Pac. 850, and for the reasons there stated, the judgment is reversed, and the cause remanded with instructions to follow the order of the departmental opinion.

<sup>1</sup>Reported in 166 Pac. 777.

<sup>2</sup>Reported in 166 Pac. 793.

[No. 13839. Department One. August 17, 1917.]

LOUIS HENSEN, *Appellant*, v. W. H. PETER, *Respondent*.<sup>1</sup>

Appeal from an order of the superior court for King county, Jurey, J., entered September 27, 1916, denying confirmation of an execution sale, upon sustaining objections thereto. Reversed.

*McBurney & O'Connor*, for appellant.

*Cochran & Plummer* and *Van Dyke & Thomas*, for respondent.

ON PETITION FOR REHEARING.

PER CURIAM.—Respondent has filed a petition for a rehearing *En Banc* of this case, and suggests that, in the event his petition should be denied, the court should fix a reasonable time, not less than thirty days, within which respondent may redeem the property affected by this litigation, by paying to appellant the amount of the judgment, with interest and costs. Our attention is directed to the fact that, during the pendency of the case in this court and prior to the filing of the opinion, the period of redemption provided by Rem. Code, § 594, expired, the time limited by that statute beginning to run from the date of the execution sale.

We have again considered the question presented by this appeal and are satisfied with the opinion heretofore filed in the case and reported in 95 Wash. 628, 164 Pac. 512. The appeal was prosecuted from an order of the superior court denying appellant's motion for confirmation of an execution sale of real property. The right of the respondent to redeem the property from the sale, in the event the judgment of the lower court should be reversed, is not presented by the record, and therefore is not properly before the court for consideration. Respondent's remedy, if any, is by application to the superior court.

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<sup>1</sup>Reported in 166 Pac. 1119.

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13. **APPEAL—REVIEW—VERDICTS.** A verdict upon questions of fact submitted to the jury is conclusive on appeal. *Gray v. Hickey*.. 278
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15. **APPEAL—REVIEW—FINDINGS.** Upon conflicting evidence, findings will not be disturbed when supported by all the evidence. *Mezger v. Hazelwood Irrigated Farms Co.* ..... 43
16. **APPEAL—REVIEW—FINDINGS.** Findings upon conflicting evidence will not be disturbed where the evidence does not preponderate against them. *Laubach Union Check Valve Co. v. Laubach*..... 115
17. **APPEAL—REVIEW—FINDINGS.** Findings upon conflicting evidence, and in accord therewith, will not be disturbed on appeal. *Lunn v. Hellgren* ..... 458
18. **APPEAL—REVIEW—ERRORS FAVORABLE TO APPELLANT.** Owners, alleging excessive taxation of coal lands, cannot complain of the

## APPEAL AND ERROR—CONTINUED.

- methods of the court in reducing the assessments, in that it gave the owners the advantage of a reduction whenever certain expert witnesses testified to no value or did not uphold the assessor's valuation; since it was favorable rather than unfavorable to them. *Northwestern Improvement Co. v. Pierce County*..... 528
19. APPEAL—REVIEW—HARMLESS ERROR. Error in refusing to strike certain allegations from the complaint is harmless where the court refused to permit any evidence thereon to go to the jury. *Eyers v. Burbank Co.* ..... 220
20. APPEAL—REVIEW—HARMLESS ERROR—VIEW BY COURT. In an action tried to the court, a view of the premises without the consent of the appellant cannot be assigned as error where the trial judge did not take the view into consideration and rendered his decision entirely on the evidence. *Richardson v. Seattle*..... 521
21. APPEAL—REVIEW—HARMLESS ERROR. Error cannot be predicated upon the opening statement of counsel in rehearsing incompetent facts he expected to prove, where the jury were instructed that the same was subject to the further action of the court in permitting him to introduce testimony and there was no showing that appellant was prejudiced. *Eyers v. Burbank Co.*..... 220
22. APPEAL—REVIEW—HARMLESS ERROR. Prejudicial error cannot be predicated upon the admission of evidence to which no particular weight was attached and which does not appear to have prejudiced appellant in any way. *Eyers v. Burbank Co.*..... 220
23. APPEAL—REVIEW—HARMLESS ERROR. Error in refusing to allow cross-examination of an adverse party as to a contract in issue is not ground for reversal where the contract was proved and subsequently admitted in evidence and the appellant was not prejudiced. *Eyers v. Burbank Co.*..... 220
24. APPEAL—REVIEW—FORMER DECISION AS LAW OF CASE. A decision on appeal that a verdict for \$363 should be allowed to stand as against a motion for a judgment notwithstanding the verdict is conclusive upon a second appeal from a judgment and verdict for \$362, upon evidence not materially different from that given on the previous trial. *Jorgenson v. Crane*..... 676

## XVII. DETERMINATION AND DISPOSITION OF CAUSE.

25. APPEAL — DECISION — STARE DECISIS. The rule of *stare decisis* should not be applied to prevent the overruling of decisions making community personal property liable for the husband's separate debts, since it does not affect the title to real property or affect vested rights in antecedent sales of personalty, and to follow the rule would perpetuate error and sacrifice principle. *Schramm v. Steele* ..... 309
26. APPEAL—DECISION—REMAND. In an action to set aside a judgment, in which the plaintiff failed to introduce substantial evidence

**APPEAL AND ERROR—CONTINUED.**

to show that he had a meritorious defense, owing to incoherence in the decisions of the supreme court, the case will be remanded for a new trial. *Chehalis Coal Co. v. Laisure*..... 422

27. **APPEAL — DECISION — PROCEEDINGS AFTER REMAND — NEW TRIAL — "FURTHER PROCEEDINGS."** Where a judgment on the merits denying foreclosure of a mortgage was, on trial *de novo*, reversed and remanded "for further proceedings," the merits of the matter are foreclosed and the lower court has no power to grant a new trial or take any steps beyond the further proceedings incidental to carrying out the foreclosure. *State ex rel. Moore & Co. v. Superior Court* ..... 250

**APPLIANCES:**

Liability of employer for defects or failure to guard, see **MASTER AND SERVANT**, 1.

**APPLICATION:**

For writ of certiorari, see **CERTIORARI**.

For vacation of judgment, see **JUDGMENT**, 6.

Of purchase money on sale of liened logs, see **LOGS AND LOGGING**, 2.

**APPOINTMENT:**

Of receiver, see **RECEIVERS**, 1, 2.

**APPROPRIATION:**

Of water rights in public lands, see **WATERS AND WATER COURSES**.

**APPROVAL:**

Of moving pictures by advisory committee of city, see **THEATERS AND SHOWS**, 1.

**ARCHITECTS:**

Approval of work under contract, see **CONTRACTS**, 2.

**ARGUMENT OF COUNSEL:**

In criminal prosecutions, see **CRIMINAL LAW**, 9.

**ASSESSMENT:**

Liability of stockholders to assessment on stock, see **CORPORATIONS**, 2.

Of expenses of public improvements, see **MUNICIPAL CORPORATIONS**, 9-16.

Of tax, see **TAXATION**, 1-5.

**ASSIGNMENTS:**

See **CHATTEL MORTGAGES**, 2, 3.

Effect of vacation of judgment on assignee of warrant given in satisfaction of damages, see **EMINENT DOMAIN**, 3.

**ASSIGNMENTS—CONTINUED.**

Priority of garnishment over rights of assignee, see **GARNISHMENT**, 2.

Of patent rights, see **PATENTS**.

Of reserve retained for protection against lien claimants, in contract for public work, see **STATES**, 2.

**ASSISTANCE:**

Writ of to obtain possession by mortgagee on foreclosure, see **MORTGAGES**, 5.

**ASSUMPTION:**

Of facts in charge to jury, see **CRIMINAL LAW**, 11; **TRIAL**, 2.

Of mortgage, see **MORTGAGES**, 4.

**ATTORNEY AND CLIENT:**

Harmless error in conduct of counsel at trial, see **APPEAL AND ERROR**, 21.

Argument and conduct of counsel at trial in criminal prosecutions, see **CRIMINAL LAW**, 9.

Conduct at criminal trial as harmless error, see **CRIMINAL LAW**, 18.

Recovery of attorney's fees in action on injunction bond, see **INJUNCTION**, 2.

Power of attorney as constituting equitable mortgage, see **MORTGAGES**, 1.

Attorneys in fact, see **PRINCIPAL AND AGENT**, 2.

Privileged communications, see **WITNESSES**, 2.

1. **ATTORNEY AND CLIENT—STIPULATIONS—POWER OF CITY ATTORNEY.**  
At the trial of condemnation proceedings, the city attorney has power to bind the city by stipulation waiving the right to make an assessment. *Richardson v. Seattle*..... 371
2. **ATTORNEY AND CLIENT—CONTRACT OF EMPLOYMENT—CONSTRUCTION—PERFORMANCE.** Under an attorney's contract to secure a permit from the United States to flood certain lands under the act of February 15, 1901, 31 Stat. L. 790, which provided that such permission should not vest any right or interest in public land and could be revoked by the Secretary of the Interior at his discretion for which service the attorney was to receive \$25,000, with a further provision for additional compensation in the sum of \$25,000 if the attorney should within three years procure and cause to be vested the "perpetual right, power and authority to flood the land," the additional compensation is not earned by procuring a revocable permit under the act of February 15, 1901, but the last clause contemplates a greater right than that obtainable under that act. *Crane v. Washington Water Power Co.*..... 7
3. **SAME.** In such a case, the attorney was not prevented from performing the contract as to the perpetual right by the fact that,

**ATTORNEY AND CLIENT—CONTINUED.**

after the permit obtained by him was revoked, other attorneys were employed to get the permit restored. *Crane v. Washington Water Power Co.* ..... 7

**AUTHORITY:**

Of attorney, see **ATTORNEY AND CLIENT**, 1.

Of corporate officers or agents, see **CORPORATIONS**, 4.

Of school directors to build schoolhouse, see **SCHOOLS AND SCHOOL DISTRICTS**, 2.

**AUTOMOBILES:**

Collision with train at crossing, see **RAILROADS**, 1, 4.

**BANKRUPTCY:**

1. **BANKRUPTCY—PREFERENCE—BURDEN OF PROOF—INSOLVENCY—STATUTES.** In a suit by a trustee in bankruptcy to recover a preference by a bankrupt corporation, the burden is upon the trustee to show that the bankrupt was insolvent when the preference was made, within the state rule that a corporation is insolvent when it is not able to pay its debts in due course of business, making its assets a trust fund for the payment of its debts; and where there is no controversy upon that issue, it is error to submit it to the jury, under the rule of the bankruptcy act, Fed. Stat. Ann. p. 511, providing that a person is deemed insolvent when his property, undisposed of, shall not, at a fair valuation, be sufficient to pay his debts. *Simpson v. Western Hardware & Metal Co.* ..... 626

**BANKS AND BANKING:**

Statements of officer of bank as to financial standing of other concern, see **FRAUD**, 1.

**BAR:**

Of action, see **ELECTION OF REMEDIES**, 2.

Of action by former adjudication, see **JUDGMENT**, 11.

Of action by limitation, see **LIMITATION OF ACTIONS**.

**BENEFITS:**

To property from local improvement, see **MUNICIPAL CORPORATIONS**, 10, 11, 14.

**BIAS:**

Of juror, see **JURY**.

**BILL OF PARTICULARS:**

See **PLEADING**, 2.

**BILLS AND NOTES:**

Election of remedies by defendant in action on note defended on ground of fraud, see **ELECTION OF REMEDIES**, 1.



**BILLS AND NOTES—CONTINUED.**

1. **BILLS AND NOTES—ACTIONS—DEFENSES—PAYMENT — SUFFICIENCY OF PLEADING.** An allegation that defendants were sureties upon a note and that plaintiff agreed to collect the note from the maker and notify the sureties if it was not paid at maturity and that plaintiff failed to do so, and by reason thereof the note was paid, is not good as a plea of payment, the only plea of payment being a conclusion. *Cowen v. Culp*..... 480

**BLACKMAIL:**

Prosecution for, see **THREATS**.

**BOARDS:**

District boards, power to build schoolhouse, see **SCHOOLS AND SCHOOL DISTRICTS**, 2.

**BONDS:**

Laws impairing obligation of contractor's bond, see **CONSTITUTIONAL LAW**, 2.

Right of action on jitney bond for wrongful death of minor, see **DEATH**.

Redelivery bonds, see **FORCIBLE ENTRY AND DETAINER**, 1, 2.

Recovery of attorney's fees in action on injunction bond, see **INJUNCTION**, 2.

Municipal bonds, see **MUNICIPAL CORPORATIONS**, 16-18.

For operation of jitney, liability of surety, see **MUNICIPAL CORPORATIONS**, 19.

Sureties on bonds, see **PRINCIPAL AND SURETY**.

School district bonds, see **SCHOOLS AND SCHOOL DISTRICTS**, 3.

Contractor's bonds, see **STATES**.

**BOOKS OF ACCOUNT:**

Admissibility in evidence, see **WITNESSES**, 1.

**BOUNDARIES:**

Of school district, review of decision of county commissioners, see **SCHOOLS AND SCHOOL DISTRICTS**, 1.

**BREACH:**

Of contract, see **CONTRACTS**.

Of contract of sale, see **SALES**, 1.

Of warranty, see **SALES**, 4.

Of contract for sale of land, see **VENDOR AND PURCHASER**.

**BROKERS:**

Representations of broker inducing purchase of land, see **FRAUD**, 7-10.

1. **BROKERS — CONTRACTS — PERFORMANCE — EVIDENCE—SUFFICIENCY.** Findings that a broker was authorized to sell lots for \$9,500, which was but \$100 less than the price authorized by the contract, are

## BROKERS—CONTINUED.

- sustained where a witness testified that such authority was given in consideration of the broker's agreement to make up the \$100 on sales of other lots, which was done, and the testimony of the plaintiffs to the effect that they demanded \$10,000, which was \$400 more than the contract gave them, and that the broker agreed to throw off \$500 in commissions, was highly improbable. *Parker v. Seattle Land & Improvement Co.*..... 84
2. SAME. The claim of owners that a broker attempted to deceive them by representing that a sale of lands to a city for a park was made for \$25,000 instead of \$30,000 received, and that \$5,000 was unlawfully retained, is not sustained, where the sale was public and a matter of notoriety, the price was paid by city warrant to the president of the broker, a man possessed of the trust and confidence of the business world, who testified that the \$5,000 was retained under an express agreement to be accounted for at the expiration of the contract, under which commissions had then been earned on sales amounting to \$40,000. *Parker v. Seattle Land & Improvement Co.* ..... 84
3. SAME—COMMISSIONS—DEDUCTION FROM PAYMENTS. Where a broker was to receive commissions when the aggregate sales amounted to \$40,000, it was not required to pay over the money on the last sale, but could deduct its commissions and pay over the balance due. *Parker v. Seattle Land & Improvement Co.*..... 84
4. SAME—CONTRACT FOR COMMISSIONS—RIGHT TO TERMINATE. A repudiation of a broker's contract is not warranted because of the broker's refusal, on demand for an accounting, to accede to the owners' demands, where there was a *bona fide* dispute as to the amount due and no settlement could be reached. *Parker v. Seattle Land & Improvement Co.*..... 84
5. SAME—RIGHT TO COMMISSIONS—TIMELY PERFORMANCE—TENDER. A broker procures a purchaser able and willing to take the property and is entitled to its commissions, where, upon the owners' refusal to execute a deed with an unauthorized condition as to payment, it procured the full cash price and tendered the money within the time limit of the contract and demanded a deed in the name of the purchaser which tender and demand the owners refused. *Parker v. Seattle Land & Improvement Co.*..... 84
6. SAME—PERFORMANCE—TENDER—SUFFICIENCY. Where the owners, within the limit of a broker's contract, refused a tender of the full cash price, the broker earned its commissions and is not required to keep the tender good by a deposit, since the owners' failure to accept the tender within a reasonable time makes the default their own. *Parker v. Seattle Land & Improvement Co.*..... 84
7. SAME. Under a contract, authorizing a broker to sell lots at fixed prices, which it was to collect and account for, in order to entitle

**BROKERS—CONTINUED.**

the broker to a performance, it was not necessary to tender in excess of the contract price. *Parker v. Seattle Land & Improvement Co.* ..... 84

**BUILDING CONTRACTS:**

See CONTRACTS, 2-5.

**BUILDINGS:**

School buildings, see SCHOOLS AND SCHOOL DISTRICTS, 2, 3.

**BURDEN OF PROOF:**

To show insolvency of bankrupt, see BANKRUPTCY.

To overcome *prima facie* liability of surety after judgment against principal, see PRINCIPAL AND SURETY, 1.

**BURGLARY:**

Evidence in prosecution for, see CRIMINAL LAW, 5.

1. BURGLARY — EVIDENCE — IDENTIFICATION. In a prosecution for burglary, a general identification of the accused, as, in witness' best belief, the man who had been seen with a stolen car, is sufficient without proof of particular marks or peculiarity. *State v. Dotson* ..... 607
2. BURGLARY—EVIDENCE—SUFFICIENCY. A conviction of burglary is sustained by evidence that a garage was broken open and a car stolen therefrom on the night of defendant's arrival at the place, that the car was tracked to and abandoned at S. early the next morning, after a hard trip, having stopped en route at a garage, and the accused was identified as the man who had driven it there, and that he left S. that day, having in his possession a number of automobile keys for different makes of cars. *State v. Dotson*..... 607

**BY-LAWS:**

Of corporation, see CORPORATIONS, 2, 3.

**CANCELLATION OF INSTRUMENTS:**

Invalid assessment, see MUNICIPAL CORPORATIONS, 12.

Termination of agency contract, see PRINCIPAL AND AGENT, 1.

Rescission of contract, see SALES, 2; VENDOR AND PURCHASER, 2-4.

Venue of action to cancel mortgage, see VENUE.

**CANVASS:**

Of names on referendum petitions, see STATUTES, 1.

**CARRIERS:**

Unlawful shipments of liquor into state, see INTOXICATING LIQUORS, 1-5.

1. CARRIERS—OVERCHARGES—RECOVERY—CONDITIONS PRECEDENT—LIMITATIONS—STATUTES. Rem. Code, § 8626-91, providing that all claims

**CARRIERS—CONTINUED.**

concerning transportation overcharges shall be filed with the public service commission within two years from the time the cause of action accrues, is an exclusive remedy to the extent that it requires a submission of the action to the public service commission within two years as a condition precedent to the right to maintain an action; and it is not unconstitutional or beyond the power of the legislature, as curtailing the common law, as declared by Const., art. 12, § 15, compelling fairness in freight charges, to provide an inquiry by a board skilled in the science, as a prerequisite to the institution of a suit and within a definite time; since there is no abolition of the remedy and no vested right in procedure. *Hewitt Logging Co. v. Northern Pac. R. Co.*..... 597

**CAUSE OF ACTION:**

Joinder of, see ACTION.

**CAVEAT EMPTOR:**

Receiver's sales, see RECEIVERS, 4.

**CERTAINTY:**

Of contract, see SUBSCRIPTIONS, 2, 3.

**CERTIORARI:**

Review of order of county board affirming decision of superintendent of schools relating to boundaries of district, see SCHOOLS AND SCHOOL DISTRICTS, 1.

1. CERTIORARI—APPLICATION—STATEMENT OF GROUNDS. A writ of certiorari to review error will not be granted, unless the application points out the specific error committed, when none appears on the face of the record, and it is not sufficient to state that the action "was erroneous and not according to the rules of the common law." *State ex rel. Warner v. Superior Court*..... 472

**CHALLENGE:**

To evidence, see TRIAL, 4, 5.

**CHANGE OF VENUE:**

Of criminal prosecutions, see CRIMINAL LAW, 1.

Denial of change, see PROHIBITION.

Of civil actions, see VENUE.

**CHARGE:**

To jury in criminal prosecutions, see CRIMINAL LAW, 10-14.

To jury in civil actions, see TRIAL, 2, 3.

**CHATTEL MORTGAGES:**

1. CHATTEL MORTGAGES—PROPERTY SUBJECT—CHOSE IN ACTION. Rem. Code, § 3659, providing that chattel mortgages may be made "upon all kinds of personal property" refers to tangible property that may

**CHATTEL MORTGAGES—CONTINUED.**

- be taken into possession and not intangible property such as accounts and income and things in action (overruling on rehearing, *Id.*, 93 Wash. 595). *Heermans v. Blakeslee*..... 647
2. **CHATTEL MORTGAGES—ASSIGNMENTS—CONSTRUCTION—CHOSE IN ACTION.** An assignment of the “present and future earnings and income” of a water works company, “as security for payments and advances” is simply an assignment of a chose in action and not a chattel mortgage, and need not be accompanied by an affidavit of good faith or recorded as required by Rem. & Bal. Code, § 3660 (overruling on rehearing, *Id.*, 93 Wash. 595). *Heermans v. Blakeslee* ..... 647
3. **CHATTEL MORTGAGES—FORECLOSURE—SALE—TITLE OF PURCHASER—SHERIFF’S BILL OF SALE TO ASSIGNEE—VALIDITY.** Where a chattel mortgage was foreclosed and the property bid in for the mortgagee by an agent acting under power of attorney and the sheriff’s return so showed, but the mortgagee died before bill of sale, whereupon the agent under the power of attorney assigned the property, and the sheriff’s return was altered to show sale to the assignee, the sheriff’s bill of sale to the assignee did not pass the title as against the estate of the mortgagee; since the title passed by the sale to the mortgagee, whose death revoked the power of attorney, rendering the assignment valueless, and no act of the sheriff thereafter could affect the title; in view of Rem. Code, §§ 1107, 1108, providing that the purchaser at chattel mortgage foreclosure sales shall take all the interest of the mortgagor in the mortgaged property. *Larson v. Anderson* ..... 484

**CHOSE IN ACTION:**

Assignment of, see **CHATTEL MORTGAGES**, 2.

**CIRCUMSTANTIAL EVIDENCE:**

In criminal prosecutions, see **CRIMINAL LAW**, 5.

**CITIES:**

See **MUNICIPAL CORPORATIONS**.

**CLAIMS:**

- Inconsistent claims, see **ESTOPPEL**, 2.
- Against estate of decedent, see **EXECUTORS AND ADMINISTRATORS**, 1.
- Priority of mortgage over claims for materials furnished contractor, see **MORTGAGES**, 2, 3.
- Against city, see **MUNICIPAL CORPORATIONS**, 32-34.
- Against property in hands of receiver, see **RECEIVERS**, 5, 6.
- Against contractor’s bond, see **STATES**.

**COLLATERAL ATTACK:**

- On judgment, see **JUDGMENT**, 9.
- On appointment of receiver, see **RECEIVERS**, 2.

**COLLISION:**

At railroad crossing, see **RAILROADS**, 1-4.

**COMMENT:**

On evidence by judge, see **CRIMINAL LAW**, 11; **TRIAL**, 1.

**COMMERCE:**

Carriage of goods and passengers, see **CARRIERS**.

1. **COMMERCE—INTERSTATE COMMERCE—INTOXICATING LIQUOR—PERMITS—STATUTES—CONSTRUCTION.** Since the Webb-Kenyon act, 1914 Fed. Stat. Ann. 208 (U. S. Comp. St. 1916, § 8739), was intended to divest of their interstate commerce character shipments of liquor in violation of state laws, it prohibits an interstate shipment into this state made in violation of Rem. Code, § 6262-18, which makes it unlawful for a transportation company to transport intoxicating liquor into the state without a permit issued by the county auditor and affixed to the parcel containing the liquor; hence it is immaterial to the rights of the railroad company shipping the liquor that the breach of the prohibition law related to the manner of shipment and that there is no general prohibition of the shipment of intoxicating liquor into the state. *State v. Great Northern R. Co.* . . . . . 137
2. **SAME.** Since the Webb-Kenyon act (U. S. Comp. St. 1916, § 8739) divests of their interstate commerce character shipments of liquor in violation of state laws, it is immaterial whether that act repealed U. S. penal statutes, §§ 238 to 240, Act Cong. March 4, 1909, as to the manner of labeling, transporting, and delivering interstate liquor shipments. *State v. Great Northern R. Co.* . . . . . 137
3. **COMMERCE—INTERSTATE COMMERCE—INTOXICATING LIQUORS—STATE REGULATION.** The prohibition initiative measure (Laws 1915, p. 2) relating to intoxicating liquors, in so far as it regulates shipments into the state, is not an unlawful interference with interstate commerce; since, by the Webb-Kenyon act, 37 U. S. Stat. at L., p. 699, ch. 90, Congress, in declaring unlawful the shipment of intoxicating liquors into a state to be received, possessed, sold or used in violation of any law of such state, has divested intoxicating liquors of their interstate character in so far as the power of the state to regulate the sale and disposition is concerned. *State v. Warburton.* 242
4. **COMMERCE—INTOXICATING LIQUORS—REGULATION OF STATES.** Rem. Code, § 6262-20, is not violative of the commerce clause of the Federal constitution, since the Webb-Kenyon act (U. S. Comp. St. 1916, § 8739) authorizes state legislation controlling interstate shipments of intoxicating liquors, and divests such shipments of their character of interstate commerce when violative of state law. *State v. Owen* . . . . . 466
5. **SAME—OFFENSES—ILLEGAL TRANSPORTATION—EVIDENCE—SUFFICIENCY.** A conviction for transporting liquors not labeled as re-

**COMMERCE—CONTINUED.**

quired by law, is sustained where it appears that the accused operated a jitney, and was hired by others to go to Montana, and returned with two half-gallon jugs and one five-gallon demijohn of whiskey in the car, none of the containers having the required permit attached, the accused lending himself and his car to the unlawful enterprise after having knowledge of the presence of the whiskey shortly after reentering this state. *State v. Owen*..... 466

**COMMISSIONERS:**

Discretion of insurance commissioner to issue permit to company to write other classes of insurance, see **INSURANCE**.

**COMMISSIONS:**

Of broker, see **BROKERS**.

For services of executors, see **EXECUTORS AND ADMINISTRATORS**, 4-6.

**COMMON CARRIERS:**

See **CARRIERS**.

**COMMUNITY PROPERTY:**

See **HUSBAND AND WIFE**.

**COMPENSATION:**

Of attorney, see **ATTORNEY AND CLIENT**, 2, 3.

Of broker, see **BROKERS**.

For property taken or damaged for public use, see **EMINENT DOMAIN**.

Of executor or administrator, see **EXECUTORS AND ADMINISTRATORS**, 2-6.

Of guardian, see **GUARDIAN AND WARD**, 2.

Recovery of attorney's fees in action on injunction bond, see **INJUNCTION**, 2.

Right of city officer to recover interest on back salary retained from monthly payments, see **INTEREST**.

For use of city streets by railway company, see **STREET RAILROADS**.

**COMPETENCY:**

Of experts as witnesses, see **EVIDENCE**, 2.

Of jurors, see **JURY**.

Of witnesses in general, see **WITNESSES**, 2, 3.

**COMPLAINT:**

In criminal prosecutions, see **CRIMINAL LAW**, 2, 3; **INDICTMENT AND INFORMATION**.

In civil actions, see **PLEADING**, 1.

Made by prosecutrix, evidence of, see **RAPE**.

**COMPROMISE AND SETTLEMENT:**

See **ACCORD AND SATISFACTION**.

**COMPUTATION:**

Of compensation of executors, see **EXECUTORS AND ADMINISTRATORS**, 2-4.

**CONCLUSION:**

Of witness, see **EVIDENCE**, 2.

**CONCLUSIVENESS:**

Of judgment in divorce, see **DIVORCE**, 8, 9.

Of judgment, see **JUDGMENT**, 2, 11.

Of confirmation of assessment, see **MUNICIPAL CORPORATIONS**, 12.

Of judgment against principal as binding surety, see **PRINCIPAL AND SURETY**, 1.

**CONDEMNATION:**

Taking or damaging property for public use, see **EMINENT DOMAIN**.

**CONDITION:**

Precedent to recovery of overcharge by carrier, see **CARRIERS**.

Precedent to recovery of attorney's fees in action on injunction bond, see **INJUNCTION**, 2.

**CONDUCT:**

Of counsel as harmless error, see **APPEAL AND ERROR**, 21.

Of counsel at criminal trial, see **CRIMINAL LAW**, 9, 18.

Of judge at civil trial, see **TRIAL**, 1.

**CONFESSIONS:**

Admissibility in evidence, see **CRIMINAL LAW**, 7.

Judgment upon confession under warrant of attorney, see **JUDGMENT**, 9, 10.

**CONSIDERATION:**

For settlement, see **ACCORD AND SATISFACTION**.

Of deed, see **DEEDS**, 1.

For contract to pay subscription, see **SUBSCRIPTIONS**, 4.

**CONSTITUTIONAL LAW:**

Regulation of interstate commerce, see **COMMERCE**, 1-4.

Dissolution of corporation for failure to pay license fees as denial of due process of law, see **CORPORATIONS**, 6.

1. **CONSTITUTIONAL LAW—LEGISLATIVE FUNCTIONS.** Whether the seventh amendment to the state constitution is violative of U. S. Const., art. 4, § 4, guaranteeing a republican form of government, is a Federal question, and the Federal courts uniformly hold that the guarantee is of a political character exclusively committed to Congress and beyond the jurisdiction of the courts. *State v. Owen*..... 466
2. **CONSTITUTIONAL LAW—OBLIGATION OF CONTRACT—CONTRACTOR'S BOND—RETROACTIVE STATUTE.** Rem. Code, § 1161-1, making retro-



## CONSTITUTIONAL LAW—CONTINUED.

active §§ 1159 and 1159-1, providing that money loaned to a contractor upon public work should not be a valid claim against the contractor's statutory bond, as theretofore provided by Rem. & Bal. Code, § 1159, is unconstitutional as to a bond and contract executed prior to the enactment of the statute, since it impairs the obligation of the contract in violation of Const., art. 1, § 23. *Title Guaranty & Surety Co. v. Coffman, Dobson & Co.*..... 211

3. CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF FRANCHISE—TELEGRAPH AND TELEPHONE COMPANIES. A charge of fifty cents for each telegraph or telephone pole maintained for use in any city street or alley is a rental which may be charged by the city for the privilege of using the streets only by way of contract; and after a city has granted a franchise to a telephone company granting it the right to use its streets and alleys for the erection of poles without exacting any charge upon the poles as a condition precedent to their maintenance, and the franchise has been accepted and acted upon, the city cannot, by charter or ordinance, exact such a charge, since it would be impairing the obligation of the contract in violation of the Federal constitution. *Pacific Telephone & Telegraph Co. v. Everett* 259

## CONSTRUCTION:

- Of contract of employment, see ATTORNEY AND CLIENT, 2, 3.  
 Of assignment of earnings and income of water company, see CHATTEL MORTGAGES, 2.  
 Of state-wide prohibition law, see COMMERCE, 1.  
 Of statute giving husband management and control of community personal property, see HUSBAND AND WIFE, 2.  
 Of law prohibiting shipment of liquor "within" state without securing permit, see INTOXICATING LIQUORS, 4.  
 Of statute creating port districts, see MUNICIPAL CORPORATIONS, 1.  
 Of ordinance relating to nomination of city officers, see MUNICIPAL CORPORATIONS, 3.  
 Of contract for public improvement, see MUNICIPAL CORPORATIONS, 5-7.  
 Of statute, see STATUTES, 1, 2, 4.  
 Of ordinance regulating moving picture shows, see THEATERS AND SHOWS, 1.  
 Of verdict in civil action, see TRIAL, 6.

## CONSTRUCTIVE TRUSTS:

See TRUSTS.

## CONTEMPT:

1. CONTEMPT—EVIDENCE—SUFFICIENCY. Where, upon a hearing for settlement, a guardian admitted that he had the money due his ward in a safe-deposit box, he is guilty of contempt in refusing to pay it over on the judgment entered requiring him to do so; and it is no excuse that the guardian's brother had raised the money and subse-

**CONTEMPT—CONTINUED.**

quently refused to allow it to be drawn upon, where no intimation of such fact was made at the hearing. *In re Anderson*..... 683

2. **SAME—POWERS OF COURT—IMPRISONMENT.** Where a guardian was in contempt for failing to pay over money to his ward, as required by a judgment, the court has jurisdiction to adjudge the contempt and commit him to the county jail until the order is complied with. *In re Anderson*..... 683

3. **SAME—PROCEEDINGS—PARTIES.** A contempt proceeding against a guardian for failure to comply with an order to pay money need not be prosecuted in the name of the state. *In re Anderson*..... 683

**CONTINUANCE:**

In criminal prosecution, see **CRIMINAL LAW**, 8.

**CONTRACTORS:**

Laws impairing obligation of contractor's bonds, see **CONSTITUTIONAL LAW**, 2.

Right to contribution from city for damages paid to injured employee, see **CONTRIBUTION**.

Priority of mortgage over claims of, see **MORTGAGES**, 2, 3.

On public work, see **MUNICIPAL CORPORATIONS**, 5-8; **STATES**.

**CONTRACTS:**

See **BILLS AND NOTES**; **DEEDS**; **ELECTION OF REMEDIES**; **SALES**; **SUBSCRIPTIONS**.

For fees, see **ATTORNEY AND CLIENT**, 2, 3.

Impairing obligation, see **CONSTITUTIONAL LAW**, 2, 3.

Subscription to corporate stock, see **CORPORATIONS**, 1.

Parol evidence to vary, see **EVIDENCE**, 1.

Agreements within statute of frauds, see **FRAUDS**, **STATUTE OF**.

Liability of purchaser under contract, on deficiency judgment, see **MORTGAGES**, 4.

For public improvements, see **MUNICIPAL CORPORATIONS**, 5-8; **STATES**.

Suretyship, see **PRINCIPAL AND SURETY**.

Specific performance, see **SPECIFIC PERFORMANCE**.

Franchise contract for use of city streets, see **STREET RAILROADS**.

Sales of realty, see **VENDOR AND PURCHASER**.

1. **CONTRACTS—PUBLIC POLICY—OFFICERS—SALARY.** An agreement by an officer before appointment to accept a less salary than that fixed by law is void as against public policy. *Rhodes v. Tacoma*..... 341
2. **CONTRACTS—BUILDING CONTRACTS—DISPUTES — AMBIGUITY — PROVINCE OF UMPIRE.** A provision in a building contract that all disputes shall be settled by the architect, whose decision shall be final, has no application, where two sets of specifications were furnished for the installation of ventilators, one for the masonry providing for galvanized iron, and the other for carpentry calling for copper, and

## CONTRACTS—CONTINUED.

the principal contractor, upon inquiry, instructed the subcontractor to bid on galvanized iron, and during the progress of the work, insisted upon copper and agreed to pay for the same as an extra; since the dispute was over an ambiguity in the contract which the parties could and did settle themselves before contracting. *Weiffenbach v. Smith* ..... 391

3. SAME—BUILDING CONTRACTS—SPECIFICATIONS—EXTRAS. In such a case, the specifications requiring copper manufactured by the R. Co. "and not elsewhere," do not apply, since the contract was made with reference to galvanized iron in the other set of specifications, and the principal contractor's agreement to pay for copper manufactured by the subcontractor as an extra puts the burden upon him of settling the dispute with the owner at his own cost. *Weiffenbach v. Smith* ..... 391

4. CONTRACTS — BUILDING CONTRACTS—PERFORMANCE OR BREACH—FINAL PAYMENT—OUTSTANDING BILLS. Under a contract for the construction of a building for the sum of \$47,000, \$35,000 of which was raised by a first mortgage and used in the payment of bills in the progress of the work, the contract providing that the balance shall be paid by a second mortgage to the contractor upon the completion of the building, the owner is not bound to execute the second mortgage while bills and claims for liens against the building were outstanding, which the contractor refused to satisfy as his duty under the contract required. *Jahn & Co. v. Mortgage Trust & Savings Bank* ..... 504

5. SAME. The fact that the owner of the building took a surety bond guaranteeing the faithful completion of the work, was merely an additional protection, and did not require the owner to rely wholly upon the bond and make final payment before the contractor had paid bills and claims for liens. *Jahn & Co. v. Mortgage Trust & Savings Bank* ..... 504

6. CONTRACTS—BREACH—ACTIONS—INSTRUCTIONS. In an action for breach of contract, an instruction authorizing verdict for the plaintiff if the defendant paid "for the number of monthly installments, and refused to pay one or more thereafter," is not susceptible of the construction that it authorizes the jury to find for plaintiff if defendant did not pay money on the day it became due. *Gray v. Hickey* ..... 278

## CONTRIBUTION:

1. CONTRIBUTION — COMMON LIABILITY — JOINT WRONGDOERS — NEGLIGENCE—ACTIONS—INSTRUCTIONS. In an action by a contractor against the city for contribution on account of damages paid to an employee for personal injuries sustained through the alleged defective plans and negligence of the city engineer, instructions are proper where they are to the effect that plaintiff cannot recover if plaintiff and

**CONTRIBUTION—CONTINUED.**

the injured employee knew of the danger and assumed the risk; that, if the employee knew of the danger he assumed the risk and plaintiff could not recover; that if the employee did not know of the danger, he could recover of his principal, but the principal could not recover from the city, where both the city and principal knew of the danger, since they were *in pari delicto*, and there can be no contribution between joint tort feasons. *Aberdeen Construction Co. v. Aberdeen* ..... 158

**CONTRIBUTORY NEGLIGENCE:**

Of person injured on street, see MUNICIPAL CORPORATIONS, 23, 24, 26-29.

Of parent, see NEGLIGENCE, 1.

Of person injured at railroad crossing, see RAILROADS, 2, 4.

**CONVERSION:**

Of funds of ward by guardian, see GUARDIAN AND WARD.

**CONVEYANCES:**

See CHATTEL MORTGAGES; DEEDS; MORTGAGES.

Contracts to convey, see VENDOR AND PURCHASER.

**CORPORATIONS:**

See MUNICIPAL CORPORATIONS.

Parol evidence to show fraud in stock subscription, see EVIDENCE, 1.

License tax on public corporation as exercise of police power, see LICENSES.

Receivers of, see RECEIVERS.

Laws creating liability of for torts, see STATUTES, 3, 4.

Taxation of corporations and corporate property, see TAXATION.

1. CORPORATIONS—STOCK—SUBSCRIPTIONS—VALIDITY — FRAUD OF PROMOTERS. A trust subscription contract, made for the benefit of the promoters and incorporators of an insurance company, is void and cannot be enforced against the corporation repudiating the same on notice from the insurance commissioner that it was discriminatory against other purchasers of stock, where it appears from a subsequent agreement that it was only optional, giving the incorporators the privilege of acquiring the stock in return for services in case the selling price should go to a premium, thereby making a secret profit, but otherwise attaching no liability to the subscription, although *prima facie* it was *bona fide*; since the promoters stand in a fiduciary capacity, and to hold such a subscription out to the public as binding was a fraud on future subscribers. *Ennis v. New World Life Insurance Co.* ..... 122
2. CORPORATIONS—STOCK—ASSESSMENTS — BY-LAWS—CONDITIONS. A by-law that no assessment shall be levied upon stock while any previous one remains unpaid unless the power of the corporation shall

CORPORATIONS—CONTINUED.

have been exercised to collect it, was intended for the protection of stockholders who have fully paid their assessments and does not exempt from further assessment one who is in default and refuses to pay all his assessments. *Pennecard v. Giant Ledge Mining Co.* 384

3. SAME—BY-LAW—REPEAL. Under by-laws providing that they may be amended or repealed by a majority vote of the trustees at a monthly meeting after notice given at the previous meeting, a by-law repealed at a monthly meeting without notice is repealed by approval of the proceedings at the next monthly meeting, the same trustees being present at both meetings. *Pennecard v. Giant Ledge Mining Co.* ..... 384

4. CORPORATIONS—REPRESENTATIONS—OFFICERS—POWERS — REPRESENTATIVES AT RECEIVER'S SALE. A corporation is not liable for misrepresentations made by an officer or trustee of the corporation at a receiver's sale of live stock in *custodia legis*, since he had no authority to do anything in connection with the sale. *Fryar v. Hazelwood Holstein Farms* ..... 78

5. CORPORATIONS—DISSOLUTION—STATUTES—EFFECT—ACTIONS. A corporation, delinquent in its license fees, is dissolved by the secretary of state's notation of dissolution entered upon its failure to apply for reinstatement within six months, pursuant to Rem. Code, § 3715d, which provides that thereupon the corporation shall be dissolved and its property shall vest in the trustees; so that the corporation cannot be thereafter sued by service of process upon its president, or jurisdiction acquired of an action to foreclose a tax lien on its property without making the trustees parties. *Peck v. Linney* ..... 103

6. SAME—DISSOLUTION—LICENSE FEES—CONSTITUTIONAL LAW — DUE PROCESS OF LAW. Rem. & Bal. Code, § 3715, providing that the names of corporations shall be stricken from the records of the secretary of state and the corporation dissolved for failure to pay the annual license fees, unless reinstated under § 3715a, is not unconstitutional as violative of the due process clauses of the state or Federal constitutions. *Peck v. Linney*..... 103

7. SAME—DISSOLUTION—VALIDITY—PREMATURE ENTRY. Under Rem. Code, § 3715d, providing for the dissolution of delinquent corporations failing to apply for reinstatement within six months, by the entry of a notation by the secretary of state upon his records, a dissolution is not invalid from the fact that the secretary made the notation one day too soon, where the record was left standing subsequent to the time when it ought to have been made, since the making of the notation was a ministerial act. *Peck v. Linney*.. 103

8. SAME—DISSOLUTION—STATUTES—AMENDMENT—EFFECT — ACTIONS. Where a corporation was stricken from the records and dissolved under the act of 1909, Rem. & Bal. Code, §§ 3715a-3715d, for failing to

**CORPORATIONS—CONTINUED.**

pay its license fees or apply for reinstatement within six months, prior to the amendment of that act by the act of 1911, Rem. Code, § 3715a, which authorized a reinstatement of stricken corporations at any time and rendered the former provision for dissolution inoperative, such dissolution is effectual while the corporation remains in a dormant condition, so that it cannot be sued in the absence of any steps for its reinstatement. *Peck v. Linney*..... 103

**COSTS:**

Presentment of claim for judgment for costs against administrator, see **EXECUTORS AND ADMINISTRATORS**, 1.

1. **COSTS—WITNESS FEES—MILEAGE.** Allowance of more mileage fees to witnesses than they had reported to the clerk is without prejudice, where they were allowed no more than they actually traveled. *Fryar v. Hazelwood Holstein Farms*..... 78

**COUNTERCLAIM:**

See **SET-OFF AND COUNTERCLAIM**.

**COUNTIES:**

Recall of officers, see **OFFICERS**.

Assessment of property for taxation, see **TAXATION**, 1-5.

**COURTS:**

Review of decisions, see **APPEAL AND ERROR; CERTIORARI**.

Grant of supersedeas, see **APPEAL AND ERROR**, 6.

Harmless error in view by court without consent of appellant, see **APPEAL AND ERROR**, 20.

Power to grant new trial after remand on appeal "for further proceedings," see **APPEAL AND ERROR**, 27.

Federal questions, see **CONSTITUTIONAL LAW**, 1.

Contempt of court, see **CONTEMPT**.

Power to modify absolute decree awarding alimony, see **DIVORCE**, 6, 9-11.

Power to vacate judgment awarding damages, see **EMINENT DOMAIN**, 1, 2.

Vacation of judgments, see **JUDGMENT**, 2.

Mandamus to courts, see **MANDAMUS**.

Prohibition to courts, see **PROHIBITION**.

Appointment of receiver for corporation, see **RECEIVERS**, 1.

Deposits in court, effect, see **TENDER**.

Trial by court without jury, findings, see **TRIAL**, 7.

**COVENANTS:**

In deeds, exceptions, see **DEEDS**, 4.

**CREDIBILITY:**

Of employed witnesses, instructions, see **CRIMINAL LAW**, 13.

Of witness, see **WITNESSES**, 4.

**CREDITORS:**

See **BANKRUPTCY**.

Claims of against contractor's bond, see **STATES**.

**CRIMINAL LAW:**

See **BURGLARY**; **CONTEMPT**; **RAPE**.

Violation of state-wide prohibition law, see **COMMERCE**.

Indictment, information, or complaint, see **INDICTMENT AND INFORMATION**.

Violation of liquor laws, see **INTOXICATING LIQUORS**.

Competency of juror, see **JURY**.

Violation of ordinance prohibiting offensive picture films, see **THEATERS AND SHOWS**.

Prosecution for blackmail, see **THREATS**.

1. **CRIMINAL LAW—VENUE—CHANGE—DISCRETION—LOCAL PREJUDICE—REVIEW.** The denial of a change of venue in a criminal case on account of local prejudice rests in the sound discretion of the trial court, and no abuse of discretion is shown, where it appears that on a former trial a jury disagreed and statements of the trial judge criticizing the jury and commenting upon the sufficiency of the evidence were published in the newspapers, but affidavits were filed to the effect that no prejudice was created by such publications and that defendant could have a fair trial in the county. *State v. Wright* ..... 304
2. **CRIMINAL LAW—COMPLAINT—AMENDMENT ON APPEAL FROM JUSTICE OF PEACE.** Upon appeal from a conviction in justice court, if the complaint did not charge a crime, the prosecution may file a new complaint in the superior court upon which trial proceeds after arraignment and plea. *Everett v. Cowles*..... 396
3. **SAME—APPEAL FROM JUSTICE OF PEACE—JURISDICTION—AMENDMENT OF COMPLAINT.** Where a justice court has jurisdiction over the offense, insufficiency of the complaint does not affect the jurisdiction of the court to render a judgment, and by appeal therefrom the jurisdiction follows and attaches to the superior court, authorizing an amendment of the complaint. *Everett v. Cowles*..... 396
4. **CRIMINAL LAW—EVIDENCE—ADMISSIBILITY.** Upon a prosecution for violation of an ordinance regulating picture shows, evidence of a conversation showing that defendant was the person who exhibited, and which also showed evil intent, does not open the door to evidence in rebuttal showing absence of knowledge and intent; the defendant's remedy being by motion to strike. *Seattle v. Smythe* 351
5. **CRIMINAL LAW—EVIDENCE—ADMISSIBILITY.** In a prosecution for burglary of a garage and stealing a car, it is admissible, as part of the circumstantial evidence, to introduce the license plates found on the car which had been changed to prevent identification; the clothing worn by the accused, for the purpose of comparison to aid a

## CRIMINAL LAW—CONTINUED.

- witness in identifying accused as the driver of the car; and keys of various automobiles, found in the possession of the accused, in the nature of criminal tools and implements constituting a suspicious circumstance. *State v. Dotson*..... 607
6. CRIMINAL LAW—EVIDENCE—REBUTTAL. Where a witness had admitted animus against the accused, it is not error to exclude evidence of the accused to show the relations between them, where it did not show a different or greater bias or any contradiction of the witness. *State v. Arnold*..... 611
7. CRIMINAL LAW — EVIDENCE — CONFESSIONS. Admissions of guilt made to police officers while in their custody are admissible against accused, when they were freely and voluntarily made, since they were not made under the influence of fear produced by threats. *State v. Sullivan*..... 639
8. CRIMINAL LAW—CONTINUANCE — SURPRISE—INDORSEMENT OF NEW WITNESSES. Under Rem. Code, § 2050, requiring the prosecuting attorney, at the time of filing an information, to indorse the names of witnesses known to him, it is an abuse of discretion to refuse a continuance, needed for the investigation of witnesses, where the prosecuting attorney, one working day before the trial, was by *ex parte* order, permitted to indorse the names of nine additional witnesses known to him at the time of filing the information, and which he had refused to disclose and had apparently concealed until the last possible moment, although they were worthy subjects of investigation and apparently unworthy of belief. *State v. McCaskey* ..... 401
9. CRIMINAL LAW—TRIAL—MISCONDUCT OF COUNSEL IN ARGUMENT. It is not error for the prosecuting attorney to state in argument that he fully believed in the guilt of the accused, where it was in reply to a statement that he did not have the courage to dismiss when a former jury disagreed. *State v. Wright*..... 304
10. SAME — TRIAL — INSTRUCTIONS. Where an instruction correctly stated the law and issues, the fact that it contained unnecessary verbiage is not error. *Seattle v. Smythe*..... 351
11. CRIMINAL LAW—INSTRUCTIONS—COMMENT ON FACTS. In a prosecution for blackmail, it is not an unlawful comment upon the evidence for the court to state that written instruments were libelous or to state the legal obligation with respect to executing legal documents, or that there was no evidence to establish a legal duty; since the interpretation of written instruments is for the court and the court may correctly define a matter of law and determine the issues to be submitted. *State v. Richards*..... 587
12. CRIMINAL LAW—ALIBI—INSTRUCTIONS. Where the accused offered testimony that he was elsewhere when the crime was committed, it



**CRIMINAL LAW—CONTINUED.**

is proper to instruct, upon the defense of alibi, that it was necessary for the accused to show that, at the very time of the commission of the crime, he was at another place, so far away that he could not, with ordinary exertion, have been at the place where the crime was committed. *State v. Arnold*..... 611

13. **SAME—TRIAL—INSTRUCTIONS—CREDIBILITY OF EMPLOYED WITNESSES.** Where the jury are instructed to consider the interest and bias of all witnesses, it is not error to refuse an instruction respecting the weight to be given and the interest of witnesses employed by the prosecuting attorney to obtain evidence against the accused. *State v. Sullivan* ..... 639
14. **CRIMINAL LAW—REASONABLE DOUBT—INSTRUCTIONS.** A reasonable doubt is properly defined as a substantial doubt having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such as arises from the evidence or want of evidence, and the absence of which would, after deliberation, enable one to have a settled and abiding conviction of guilt. *State v. Sullivan*..... 639
15. **CRIMINAL LAW—NEW TRIAL—DISCRETION.** The denial of a new trial for newly discovered evidence will not be disturbed in the absence of abuse of discretion, where the affidavits were controverted and a question of fact presented to the trial judge. *State v. Arnold* ..... 611
16. **CRIMINAL LAW—APPEAL—REVIEW—VERDICT.** A conviction will not be set aside for insufficiency of the evidence where it cannot be said that the evidence fails to support it. *State v. Chase*..... 249
17. **CRIMINAL LAW—APPEAL—HARMLESS ERROR.** When there was a conflict in the testimony and a question for the jury, the reversal of a conviction cannot be denied for error in admitting illegal evidence upon the vital issue in the case, merely because guilt was overwhelmingly established by other evidence. *State v. Aldrick* 593
18. **CRIMINAL LAW—HARMLESS ERROR—CURE BY INSTRUCTIONS.** Prejudicial error cannot be predicated upon misconduct of the prosecuting attorney in starting to comment on the fact that the defendant had not testified, where the court immediately checked such statement and instructed the jury that no inference could be drawn from defendant's failure to testify. *State v. Sullivan*..... 639

**CROSSINGS:**

Accident at railroad crossing, see RAILROADS, 1-4.

**CRUELTY:**

Ground for divorce, see DIVORCE, 1, 2, 5.

**DAMAGES:**

For wrongful death, see DEATH.

Compensation for property taken or damaged for public use, see EMINENT DOMAIN.

**DAMAGES—CONTINUED.**

For fraud, see **FRAUD**.

Claims against city for, see **MUNICIPAL CORPORATIONS**, 32-34.

Liability of dentist for defective work, see **PHYSICIANS AND SURGEONS**.

Counterclaim in action for damages for fraud, see **SET-OFF AND COUNTERCLAIM**.

1. **DAMAGES—PERSONAL INJURIES—CONTRIBUTORY CAUSE—EVIDENCE—SUFFICIENCY.** The evidence warrants an inference that rupture of a Fallopian tube was caused or contributed to by a fall, where it appears that pain resulted at once and continued in intensity for three days until an operation was performed, and a physician testified that pus tubes may lie dormant and cause no trouble through life, but may be ruptured by an exciting cause such as a fall. *Blystone v. Walla Walla Valley R. Co.*..... 46
2. **DAMAGES—FROM PICKETING—LOSS OF PROFITS—EVIDENCE—SUFFICIENCY.** Upon enjoining the picketing of plaintiff's restaurant, substantial damages cannot be awarded merely on a showing that there was a large falling off of their business, where there was nothing to show what the profits were; and it is not enough to show that the average gross receipts had been \$4,000 monthly and that they fell off to \$1,000 monthly. *St. Germain v. Bakery & Confectionery Workers' Union No. 9 of Seattle*..... 282

**DEATH:**

Of minor struck by jitney bus, see **MUNICIPAL CORPORATIONS**, 23, 25.

1. **DEATH—STATUTES—ACTION ON JITNEY BOND.** Parents may recover for the death of a minor child, under Rem. Code, § 5562-39, giving a cause of action against the principal and surety on the bond of a jitney bus driver to "every person injured . . . for all damages sustained," which is not restricted to persons physically injured; especially in view of the further concluding provision that the surviving husband and child shall have an action on the bond for the death of the wife or mother, which was clearly intended to supplement the general statutes on the subject of wrongful death, Id., §§ 183, 184, giving a right of action to the wife or child for the death of the husband or father, and to the father or mother for the death of a child, already embraced within the term "any person injured" in the jitney act. *Bruner v. Little*..... 319
2. **SAME—STATUTES—ACTION ON JITNEY BOND—IMPLIED REPEAL.** The concluding clause of Rem. Code, § 5562-39, giving a right of action against the principal and surety upon a jitney bus bond, to the surviving husband or child for the death of the wife or mother, was not intended to exclude recovery by parents for the death of a child, under Id., § 184; as repeals by implication are not favored, and § 5562-39 of the jitney act gives the right of action "to any person injured" and this should be read in connection with the preexisting law on the subject of wrongful death. *Bruner v. Little*..... 319

**DEBT:**

Separate or community debts, see **HUSBAND AND WIFE**.

**DEBTOR AND CREDITOR:**

See **BANKRUPTCY**.

Estoppel of parent to assert ownership of goods as against creditors of minor, see **ESTOPPEL**, 1.

**DECEDENTS:**

Estates, see **EXECUTORS AND ADMINISTRATORS**.

Testimony as to transactions with, see **WITNESSES**, 1.

**DECISION:**

Review on appeal, see **APPEAL AND ERROR**, 1, 2, 11.

Former decision as law of case, see **APPEAL AND ERROR**, 24.

On appeal, see **APPEAL AND ERROR**, 25-27.

Of board of county commissioners on appeal from orders of superintendent of schools, see **SCHOOLS AND SCHOOL DISTRICTS**, 1.

**DEDUCTION:**

By broker of commissions from payments, see **BROKERS**, 3.

**DEEDS:**

Requirements of statute of frauds, see **FRAUDS, STATUTE OF**.

1. **DEEDS—CONSIDERATION.** A deed in consideration of support is not affected by the fact that the consideration is large and that friendship entered into it. *James v. Lueders*..... 560
2. **DEEDS—DELIVERY TO AGENT—INTENT—EFFECT.** The execution of a deed intended as a testamentary disposition, and delivery to an agent to be delivered to the grantee after the grantor's death, is not effectual as a conveyance, where the grantor understood that she retained control, and retook possession of the deed, since the delivery must be absolute and beyond recall. *Rhines v. Young*..... 437
3. **DEEDS—DELIVERY—REVOCATION.** A deed, to be delivered after death, is not revoked by a subsequent will, on the theory that it was in the nature of a testamentary devise, where it was the result of an enforceable contract. *James v. Lueders*..... 560
4. **DEEDS—PROPERTY CONVEYED—RENTALS—COVENANTS—EXCEPTIONS—RIGHT To.** A deed of leased premises with covenants against all claims except as to existing leases, and conveying title to rentals "due and owing," does not pass rentals paid to the grantor in advance for the last two months of the term, according to the terms of a duly recorded lease; since they were not due or owing and the grantee was bound to notice the lease. *Frerich v. Abrams*.... 460

**DEFAULT:**

Judgment by, vacation, see JUDGMENT, 1, 3-8.

Of plaintiff as affecting right to enforce contract, see SPECIFIC PERFORMANCE.

**DEFECT:**

In highway, liability of township, see HIGHWAYS.

In city street, see MUNICIPAL CORPORATIONS, 20, 22, 24, 26, 28-31.

**DEFICIENCY:**

On foreclosure of mortgage, see MORTGAGES, 4.

**DEFINITENESS:**

Of complaint, see PLEADING, 1.

Of contract, see SUBSCRIPTIONS, 3.

**DELAY:**

In performance of contract for public improvement, see MUNICIPAL CORPORATIONS, 5-8.

**DELIVERY:**

Of deed, see DEEDS, 2, 3.

Of liquor unlawfully sold, see INTOXICATING LIQUORS, 6.

**DEMURRAGE:**

For delay in completing contract, see MUNICIPAL CORPORATIONS, 5-8.

**DENTISTS:**

Liability for defective work, see PHYSICIANS AND SURGEONS.

**DEPOSITIONS:**

1. DEPOSITIONS—OBJECTIONS TO EVIDENCE—WAIVER. Where defendant was present at the time of taking plaintiff's deposition and permitted entries from an account book to be read into the evidence without objection or demanding the annexation of the book to the deposition, he cannot object at the trial to the secondary nature of the evidence. *Sanborn v. Dentler*..... 149

**DEPOSITS:**

See TENDER.

**DESCRIPTION:**

In claims against city for damages, see MUNICIPAL CORPORATIONS, 34.

**DIRECTORS:**

Of school districts, power to build schoolhouse, see SCHOOLS AND SCHOOL DISTRICTS, 2.

**DISCHARGE:**

From indebtedness, see ACCORD AND SATISFACTION.

**DISCOVERY:**

Of fraud as affecting limitation of action, see **LIMITATION OF ACTIONS**.

**DISCRETION:**

Of insurance commissioner to issue permit to write other classes of insurance, see **INSURANCE**.

**DISCRETION OF COURT:**

Change of venue for local prejudice, see **CRIMINAL LAW**, 1.

To grant new trial for newly discovered evidence, see **CRIMINAL LAW**, 15.

**DISMISSAL AND NONSUIT:**

At trial, see **TRIAL**, 4, 5.

**DISPUTES:**

Over building contract, see **CONTRACTS**, 2, 3.

**DISSOLUTION:**

Of corporation for failure to pay license fee, see **CORPORATIONS**, 5-8.

**DIVORCE:**

1. **DIVORCE—GROUNDS—CRUELTY—INDIGNITIES.** Indifference is an indignity and unconcealed aversion is cruelty, within Rem. Code, § 982, authorizing a divorce for cruelty or personal indignities rendering life burdensome. *Sabot v. Sabot*..... 395
2. **DIVORCE—GROUNDS—DENIAL OF INTERCOURSE.** The wife's denial of sexual intercourse for twelve years without justification is ground for divorce, under Rem. Code, § 982, authorizing a divorce for cruel treatment or personal indignities rendering life burdensome, or for any other cause deemed by the court sufficient and the court shall be satisfied that the parties can no longer live together. *Nordlund v. Nordlund* ..... 475
3. **SAME—ABANDONMENT.** The refusal by a wife, living separate and apart from a husband under a decree of separate maintenance, of the husband's good faith offer to resume the marriage relation, constitutes abandonment if continued for the statutory period of one year. *Appleton v. Appleton*..... 199
4. **SAME—ABANDONMENT—COMPLAINT.** A complaint alleging that the husband, subsequent to a decree of separate maintenance, requested in good faith that the wife return to him, and that she refused, preferring to live separate and apart, is sufficient to raise the question of his good faith as a question of fact, under the rule of law encouraging reconciliations and the resumption of the marriage relation. *Appleton v. Appleton*..... 199

## DIVORCE—CONTINUED.

5. **DIVORCE—RECRIMINATION — EVIDENCE — SUFFICIENCY.** Where the wife makes no claim or proof of misconduct on the part of the husband, it is error to deny the husband's application for divorce on the ground that his conduct with a young woman employee, whom he had taken out a few times, constituted such cruelty upon his part as to deprive him of the right to complain. *Nordlund v. Nordlund* ..... 475
6. **SAME—DECREE—VACATION—FRAUD—POWER TO MODIFY.** Where an absolute decree of divorce awarding alimony is attacked upon the ground of fraud in concealing property from the wife, and the court finds that there was no fraud in the original case, there is no jurisdiction to set aside or modify the decree. *Anderson v. Anderson* 202
7. **DIVORCE—DECREE—VACATION—ATTACK FOR FRAUD.** An attack upon a judgment of divorce for fraud in its procuring, by petition in the original suit, is contrary to proper practice and is the inception of a separate independent action. *Anderson v. Anderson*..... 202
8. **DIVORCE—DECREE—RES JUDICATA—SUBSEQUENT ACTION.** A decree of separate maintenance denying a husband a divorce is *res adjudicata* as to all matters occurring between the parties up to that time, and also conclusive that the husband was in default, entitling the wife to live separate and apart; but it is not *res adjudicata* as to subsequent misconduct. *Appleton v. Appleton*..... 199
9. **DIVORCE—ALIMONY—DECREE—RES ADJUDICATA—POWER TO MODIFY PERMANENT ALIMONY.** Where a decree of divorce is an absolute one and there are no minor children, and it awards periodical installments of permanent alimony without reserving to the court the power to subsequently make further orders, the award of alimony is *res adjudicata*, and the court, in the absence of statute, has no inherent power to change or modify the decree to meet altered conditions after the time limited by statute for the modification of judgments, the defendant not having appealed or attacked the judgment for fraud or mistake. *Ruge v. Ruge*..... 51
10. **SAME.** The fact that a husband, unable to pay permanent alimony, cannot be cited for contempt, does not suspend the decree or authorize its modification, but only deprives the wife of one of the means of enforcing it until such time as the husband is able to pay it. *Ruge v. Ruge*..... 51
11. **SAME—DECREE—ALIMONY—POWER TO MODIFY.** Where the power to modify an absolute decree of divorce is not reserved, the court has no revisory control to be exercised at will. *Anderson v. Anderson* 202

## DRUGGISTS:

Violation of state-wide prohibition law, see INTOXICATING LIQUORS, 7, 8, 10, 11.

**DUE PROCESS OF LAW:**

Dissolution of corporation for failure to pay license fees as denial of due process of law, see CORPORATIONS, 6.

**DUPLICITY:**

In information, see INDICTMENT AND INFORMATION.

**EASEMENTS:**

By prescription, see ADVERSE POSSESSION.

**ELECTION OF REMEDIES:**

1. **ELECTION OF REMEDIES—INCONSISTENT REMEDIES—APPLICATION OF RULE.** In an action upon a note for the purchase price of land, defended upon the ground of fraudulent representations inducing the purchase, the defendant cannot be required to make an election between rescission of the contract, prayed for in his first answer and cross-complaint, and damages for the fraud, where, by a subsequent answer and cross-complaint he alleged that the contract had been rescinded and annulled by plaintiff for breach of condition subsequent; since the first answer prayed for something that had already happened and he had no election. *Burbank Co. v. Roblee*..... 239
2. **ELECTION OF REMEDIES—DISTINCT REMEDIES—LIENS AND BREACH OF CONTRACT.** Since there can be no lien upon wood for loss of profits through breach of a contract for cutting, an action to foreclose a lien for the cutting of wood is not an election of remedies barring a subsequent action to recover damages for loss of profits through breach of the contract. *Gray v. Hickey*..... 278

**ELECTIONS:**

For issuance of bonds for schoolhouse, see SCHOOLS AND SCHOOL DISTRICTS, 2, 3.

**EMINENT DOMAIN:**

Power of attorney to bind city by stipulation waiving right to make assessment, see ATTORNEY AND CLIENT, 1.

Public improvements by municipalities, see MUNICIPAL CORPORATIONS, 9, 11-13.

1. **EMINENT DOMAIN — JUDGMENT AWARDING DAMAGES — VACATION.** Rem. Code, § 7783, providing that judgments in eminent domain shall be final and conclusive as to the damages unless appealed from, was not intended to control the power of the superior courts to vacate and set aside such judgments as provided in the general statutes, Rem. Code, § 464; in view of Const., art 1, § 16, providing that compensation in eminent domain shall be ascertained "as in other civil cases." *Barker v. Seattle*..... 511
2. **SAME.** The fact that the judgment in eminent domain proceedings has been satisfied does not affect the jurisdiction of the court

**EMINENT DOMAIN—CONTINUED.**

to vacate it, as against the judgment creditor duly served with process. *Barker v. Seattle*..... 511

3. **SAME—JUDGMENT—AWARDING DAMAGES—VACATION—SATISFACTION BY WARRANTS—RIGHTS OF ASSIGNEE—NOTICE.** The vacation of a judgment for damages in eminent domain proceedings, for which a city warrant had been issued in satisfaction of the judgment, is binding and conclusive upon an assignee of the warrant, where the city had no notice of the assignment, and proceeded against the judgment creditor as the apparent party in interest; since such warrants are not negotiable instruments precluding settlement with the judgment creditor apparently holding the judgment, especially where no local assessment fund had been provided for the payment of the warrant. *Barker v. Seattle*..... 511

**EMPLOYEES:**

See MASTER AND SERVANT.

**ENTRY:**

Of notation of dissolution of corporation on records of secretary of state, for failure to pay license fees, see CORPORATIONS, 7.

**EQUITABLE MORTGAGE:**

See MORTGAGES, 1.

**EQUITY:**

See INJUNCTION; SPECIFIC PERFORMANCE; TRUSTS.

Form of action, see ACTION.

Equitable estoppel, see ESTOPPEL.

Vacation of judgment, see JUDGMENT, 1-10.

Action to set aside order of county board affirming decision of superintendent of schools relating to boundaries of district, see SCHOOLS AND SCHOOL DISTRICTS, 1.

**ESTATES:**

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.

**ESTOPPEL:**

Of executors to claim compensation as trustees, see EXECUTORS AND ADMINISTRATORS, 6.

By judgment, see JUDGMENT, 11.

To levy assessment for improvement, see MUNICIPAL CORPORATIONS, 13.

Of principal by recitals in power of attorney, see PRINCIPAL AND AGENT, 1.

1. **ESTOPPEL—EQUITABLE ESTOPPEL—OWNERSHIP OF GOODS.** Where a mother allowed her minor son to conduct a business and use therein personal property which she had loaned to him, and to mortgage and hold himself out as the owner thereof, she is estopped, as



**ESTOPPEL—CONTINUED.**

against his creditors, from asserting that she was the owner thereof.  
*Fuller & Co. v. Longmire*..... 254

2. **ESTOPPEL—INCONSISTENT CLAIMS.** A claim filed against an estate for care and support of the deceased will not defeat the claimant's right to receive a deed, given by the deceased in consideration of such care and support, where the claim was not filed until notice that the beneficiaries under the will would contest the deed. *James v. Lueders* ..... 560

**EVICTION:**

Of railway company from use of streets under franchise, see **STREET RAILROADS**, 1.

**EVIDENCE:**

See **DAMAGES**; **DEPOSITIONS**.

Acquisition of easement by adverse use, see **ADVERSE POSSESSION**.

Objections for purpose of review, see **APPEAL AND ERROR**, 3, 4.

Incorporation in record on appeal, see **APPEAL AND ERROR**, 9.

Harmless error in rulings on, see **APPEAL AND ERROR**, 22, 23; **CRIMINAL LAW**, 17.

Performance of contract by broker, see **BROKERS**, 1, 2, 5-7.

In prosecution for burglary, see **BURGLARY**.

Of unlawful transporting of liquor into state, see **COMMERCE**, 5.

Contempt proceedings, see **CONTEMPT**, 1.

In criminal prosecutions, see **CRIMINAL LAW**, 4-7.

Comment on by judge, see **CRIMINAL LAW**, 11.

Newly discovered evidence as ground of new trial, see **CRIMINAL LAW**, 15.

In action for divorce, see **DIVORCE**, 5.

Of value of estate in computing compensation of executors, see **EXECUTORS AND ADMINISTRATORS**, 3.

In action for fraud, see **FRAUD**, 1, 6-10.

For violation of liquor laws, see **INTOXICATING LIQUORS**, 6, 10-13.

In action to vacate judgment, see **JUDGMENT**, 7, 8.

Of liability of purchaser on deficiency judgment, see **MORTGAGES**, 4.

As to responsibility for delay of contractor on public work, see **MUNICIPAL CORPORATIONS**, 8.

Excessive assessment for benefits from improvement, see **MUNICIPAL CORPORATIONS**, 11.

For personal injuries, see **MUNICIPAL CORPORATIONS**, 22-25; **RAILROADS**, 1, 3.

Of unconditional assignment of patent rights, see **PATENTS**.

Of termination of agency, see **PRINCIPAL AND AGENT**, 1.

In action for damages from fire on right of way, see **RAILROADS**, 6.

In prosecution for rape, see **RAPE**.

Excessive assessment, see **TAXATION**, 1-5.

In prosecution for blackmail, see **THREATS**, 3.

**EVIDENCE—CONTINUED.**

Comment on by court, see TRIAL, 1.

Fraud of vendor in sale of land, see VENDOR AND PURCHASER, 1, 4.

Testimony of witnesses, see WITNESSES.

1. **EVIDENCE—PAROL EVIDENCE—TO VARY WRITING—ILLEGALITY—FRAUD.** Parol evidence contradicting a stock subscription is admissible upon an issue raised by the pleadings that the subscription contract was fraudulent as to subsequent subscribers and in violation of law. *Ennis v. New World Life Insurance Co.*..... 132
2. **EVIDENCE—NONEXPERT OPINION—DARKNESS.** A nonexpert witness may testify as to whether the degree of darkness was such that plaintiff, injured at night, could not have seen an obstruction on the sidewalk. *Blackwell v. Seattle*..... 679

**EXAMINATION:**

Of expert witnesses, see EVIDENCE, 2.

Of witnesses in general, see WITNESSES.

**EXCEPTIONS:**

In covenants of deed, see DEEDS, 4.

**EXCESSIVE ASSESSMENT:**

See TAXATION, 1-5.

For public improvement, see MUNICIPAL CORPORATIONS, 11.

**EXCUSE:**

For failure to furnish bill of particulars, see PLEADING, 1.

**EXECUTORS AND ADMINISTRATORS:**

Filing claim against estate for care and support of deceased as defeating right to deed given by deceased therefor, see ESTOPPEL, 2.

1. **EXECUTORS AND ADMINISTRATORS—CLAIMS—PRESENTATION AND PAYMENT—JUDGMENTS.** Under Rem. Code, § 1483, providing an orderly method for the presentation and payment of claims against estates, the same must be followed and claim presented for a judgment for costs, rendered against an administratrix in her action brought against the claimant. *In re Richardson's Estate*..... 488
2. **EXECUTORS AND ADMINISTRATORS—COMPENSATION—VALUE OF ESTATE—COMPUTATION.** The appraised value of the estate is *prima facie* the basis for computing the compensation of executors, in case it is unquestioned, but the actual cash value at the time of final settlement prevails in case of dispute. *In re Hagerty's Estate*. 491
3. **SAME—COMPLAINT—VALUE OF ESTATE—EVIDENCE—SUFFICIENCY.** Where the value of an estate appraised at \$150,000, was largely speculative, and in the final account the executors alleged that the total value as a basis for computing the inheritance tax was \$75,755.79, which sum an executor testified was the amount of property

**EXECUTORS AND ADMINISTRATORS—CONTINUED.**

and cash actually received and handled belonging to the estate, the latter sum furnishes the basis upon which the compensation of the executors is to be determined. *In re Hagerty's Estate*..... 491

4. **SAME—COMPENSATION—EXTRAORDINARY SERVICE — STATUTES.** Under Rem. Code, § 1549, fixing the compensation of executors at 7 per cent on the first \$1,000, 5 per cent upon the next \$1,000, and 4 per cent on all above that sum, and for any extraordinary services not ordinarily required of executors, a reasonable sum not exceeding the amount of commission allowed, the total amount cannot exceed double the commissions in an ordinary case. *In re Hagerty's Estate* ..... 491
5. **SAME—COMPENSATION—WHEN PAYABLE—INTEREST.** Executors are not entitled to pay themselves any compensation or commission prior to the time of the final settlement, and if they do so, they are chargeable with interest thereon from the date it is received. *In re Hagerty's Estate* ..... 491
6. **SAME—COMPENSATION — AS TRUSTEES — ESTOPPEL.** Where executors had at all times proceeded as such, and made their final account and requested the court to allow them compensation as such, they are entitled only to the commissions and compensation for extraordinary services allowed by statute to executors, and it is immaterial whether they acted in a dual capacity of executors and trustees. *In re Hagerty's Estate*..... 491

**EXPERT TESTIMONY:**

In civil actions, see EVIDENCE, 2.

**EXTORTION:**

See THREATS.

**EXTRAS:**

Under building contract, see CONTRACTS, 2, 3.

**FEDERAL COURTS:**

Jurisdiction, see CONSTITUTIONAL LAW, 1.

**FEEES:**

Of attorney, see ATTORNEY AND CLIENT, 2, 3.

Dissolution of corporation for failure to pay license fees, see CORPORATIONS, 5-8.

Witness fees as costs, see COSTS.

Recovery of attorney's fees in action on injunction bond, see INJUNCTION, 2.

**FILING:**

Statement of facts on appeal, time for, see APPEAL AND ERROR, 8.

Claims against contractor's bond, see STATES, 4.

Of referendum petitions, see STATUTES, 1.

**FINAL JUDGMENT:**

Appealability, see **APPEAL AND ERROR**, 2.

**FINDINGS:**

Review on appeal, see **APPEAL AND ERROR**, 14-17.

By court in civil actions, see **TRIAL**, 7.

**FIRES:**

Caused by operation of railroad, see **RAILROADS**, 5, 6.

**FORCIBLE ENTRY AND DETAINER:**

1. **FORCIBLE ENTRY AND DETAINER—REDELIVERY BOND—LIABILITY.** In forcible entry and detainer, the surety is bound by judgment for the plaintiffs, under a redelivery bond given to enable defendant to retain possession, conditioned to pay the plaintiffs any sum found due and also all costs of the action. *Morrison v. Fidelity & Deposit Co.* ..... 623
2. **SAME—REDELIVERY BOND—LIABILITY—ACTIONS.** Where the judgment in forcible entry and detainer was not stayed and execution against the defendant was returned *nulla bona*, action may be brought against defendant's sureties on his redelivery bond, notwithstanding the pendency of an appeal. *Morrison v. Fidelity & Deposit Co.* ..... 623
3. **SAME—APPEAL—STAY BOND.** Under Rem. Code, § 832, an appeal will not stay proceedings in forcible entry and detainer unless a bond is given to pay all rent and other damages pending the appeal. *Morrison v. Fidelity & Deposit Co.* ..... 623

**FORECLOSURE:**

Of mortgage, see **CHattel MORTGAGES**, 3; **MORTGAGES**, 4-6.

**FOREIGN JUDGMENTS:**

Upon confession under warrant of attorney, see **JUDGMENT**, 9, 10.

**FORMER ADJUDICATION:**

See **JUDGMENT**, 11.

**FRANCHISE:**

Laws impairing obligation of, see **CONSTITUTIONAL LAW**, 3.

For use of city streets, see **STREET RAILROADS**.

**FRAUD:**

See **SALES**, 2-4.

In trust subscription contract, see **CORPORATIONS**, 1.

Vacation of decree for fraud, see **DIVORCE**, 6, 7.

Parol evidence to show fraud in stock subscription, see **EVIDENCE**, 1.

Vacation of judgment for fraud, see **JUDGMENT**, 1, 5, 6, 8.

Limitation of action for relief on ground of fraud, see **LIMITATION OF ACTIONS**.

**FRAUD—CONTINUED.**

Counterclaim in action for, see **SET-OFF AND COUNTERCLAIM**.

Of agent in secret purchase of land, see **TRUSTS**.

Sales of realty, see **VENDOR AND PURCHASER**, 1, 3, 4.

1. **FRAUD—MISREPRESENTING FINANCIAL STANDING — EVIDENCE—SUFFICIENCY.** Damages for fraudulently misrepresenting the financial standing of a concern, which a bank officer, upon inquiry, assured the plaintiff was in good condition and would unquestionably take care of a credit about to be extended, cannot be recovered where it does not appear that the statements were made recklessly without knowledge of the truth, or as a positive statement, and the officer informed the plaintiff that the party was indebted to the bank and declined to take the note without recourse; especially where plaintiff was not satisfied and did not rely on the statements, but prosecuted further inquiry from another bank. *Barker v. Scandinavian-American Bank* ..... 272
2. **SAME—RELIANCE UPON REPRESENTATIONS—MAKING INVESTIGATION.** A purchaser may rely upon representations that land was well seeded to alfalfa and would produce seven to nine tons per acre the next season and was worth \$300 per acre, notwithstanding he visited the land and made an investigation, where it appears that he knew nothing about farming by irrigation, could not tell whether it was properly prepared for cultivation or well seeded and did not discover until next season that it was not properly prepared or seeded and would not grow a good crop of alfalfa, and was not worth to exceed \$100 per acre. *Eyers v. Burbank Co.*..... 220
3. **FRAUD—ACTION FOR DAMAGES—COMPLAINT—SUFFICIENCY.** A complaint for false representations, alleging generally that the statements were false, is not demurrable for failing to state facts specifically showing wherein they were false, the remedy being by motion to make more definite and certain. *Eyers v. Burbank Co.* 220
4. **FRAUD — ACTION FOR DAMAGES — COMPLAINT — FACTS OR CONCLUSIONS.** In an action for fraud, a complaint alleging false representations as to the value of the property sold need not allege such circumstances accompanying the representations as would make them statements of fact, where it is alleged that the representations related to material facts, that they were false and relied upon, and that plaintiff was damaged thereby. *Eyers v. Burbank Co.*.... 220
5. **SAME—RELIANCE UPON REPRESENTATIONS — COMPLAINT — SUFFICIENCY.** In an action for fraud, a complaint sufficiently alleges, as against demurrer, the plaintiff's right to rely upon representations as to land at B. sold to him, where it states that he had no knowledge of the facts existing at B. and could not determine the truth or falsity of the representations until he had visited B. and not until the latter part of a growing season, although it does not show by particular facts that he had a right to rely thereon or was excused from investigation. *Eyers v. Burbank Co.*..... 220

**FRAUD—CONTINUED.**

6. **FRAUD—ACTION FOR DAMAGES—GOOD FAITH—EVIDENCE—ADMISSIBILITY.** In an action for fraud in inducing a purchase of land, it is not prejudicial error to exclude testimony referring to defendant's good faith in making representations in a pamphlet, where the statements therein show for themselves the purpose for which they were written and defendant testified very fully as to his purposes, sources of information, and good faith. *Eyers v. Burbank Co.*.. 220
7. **FRAUD—ACTION FOR DAMAGES—REPRESENTATIONS BY AGENT—EVIDENCE—ADMISSIBILITY.** In an action for fraud in inducing a purchase of land, representations made by a broker working upon a commission basis are admissible, where his agency for the defendant was established circumstantially and an officer of the defendant made the same representations in the agent's presence when they and the plaintiff visited the land together. *Eyers v. Burbank Co.* ..... 220
8. **FRAUD—ACTION FOR DAMAGES—EVIDENCE — ADMISSIBILITY.** In an action for fraud in inducing plaintiff to purchase land, evidence is admissible of the representations concerning the land and the profits to be made therefrom, made to the plaintiff in a distant state by a soliciting agent, where, though to some extent immaterial, they all went to the matter of inducement leading up to plaintiff's conviction that statements made by the defendant after he came to see the land were true. *Eyers v. Burbank Co.*..... 220
9. **SAME.** In such a case, it is immaterial whether the soliciting agent was an authorized agent, where the defendant afterwards made the same representations in such agent's presence. *Eyers v. Burbank Co.* ..... 220
10. **SAME.** In such a case, testimony of similar representations made to other witnesses in the same state by the soliciting agent, is admissible as corroborative, to some extent, as to plaintiff's reliance thereon. *Eyers v. Burbank Co.*..... 220
11. **FRAUD—ACTIONS—MEASURE OF DAMAGES.** In an action for fraud inducing a sale where the vendee never had title and was dispossessed for breach of condition, the measure of damages is not the difference between the value of the land and what it would have been if as represented, but he may recover his expenses and outlay in going upon and improving the land. *Eyers v. Burbank Co.*.. 220

**FRAUDS, STATUTE OF:**

1. **FRAUDS, STATUTE OF — EXECUTED CONTRACTS — VALIDITY.** Where, pursuant to an oral agreement, decedent executed a deed in consideration of care and support and a note and mortgage executed by the grantees, and the contract was fully executed, and the papers delivered to an attorney, with instructions to deliver the deed to

**FRAUDS, STATUTE OF—CONTINUED.**

the grantees and the note and mortgage to his executors after his death, the transaction was not void under the statute of frauds. *James v. Lueders*..... 560

**FRAUDULENT CONVEYANCES:**

Preferences by bankrupt, see **BANKRUPTCY**.

**FUNDS:**

For payment of local improvement bonds, see **MUNICIPAL CORPORATIONS**, 16-18.

**GARNISHMENT:**

Priority of labor liens over garnishment, see **LOGS AND LOGGING**, 1.

1. **GARNISHMENT—PROPERTY SUBJECT.** Where logs had not come into the possession of a garnishee at the time the writ was served and answered, he would not be liable therefor under the writ. *Du Bois Lumber Co. v. Dietderich*..... 1

2. **GARNISHMENT—PRIORITY—ASSIGNMENTS—RIGHTS OF ASSIGNEE—ACTIONS—COMPLAINT.** Where a water company, as security for advances, assigned one-half of its water receipts and earnings, retaining one-half for its own use to apply on operation and maintenance expenses, and thereafter a creditor obtained a judgment on account of goods sold subsequent to the assignment and garnisheed certain receipts and income of the company, the assignee cannot claim a right superior to the garnishment or seek an accounting without showing that the writs of garnishment were levied upon more than half of the receipts and income. *Heermans v. Blakeslee*..... 647

**GOOD FAITH:**

Of vendor in making representations concerning land, see **FRAUD**, 6.  
As defense in prosecution for display of offensive pictures, see **THEATERS AND SHOWS**, 2.

**GOVERNMENT:**

Republican form of, see **UNITED STATES**.

**GUARANTY:**

See **PRINCIPAL AND SURETY**.

**GUARDIAN AND WARD:**

Failure of guardian to pay over money to ward, see **CONTEMPT**.  
Limitation of action by ward for fraud of guardian, see **LIMITATION OF ACTIONS**, 2.

1. **GUARDIAN AND WARD—TRANSACTIONS BETWEEN—CONVERSION—LOAN TO GUARDIAN.** Where a guardian had converted and misappropriated a fund due to his ward, and his account was unbalanced, it will not be held that the ward, on coming of age, "loaned" the money to

**GUARDIAN AND WARD—CONTINUED.**

the guardian, irrespective of an agreement to that effect, under the rule that such transactions are scrutinized with great care; since there was no fund to loan. *In re Anderson*..... 688

2. **GUARDIAN AND WARD—COMPENSATION—DEFAULTING GUARDIAN.** Where a guardian converted and misappropriated the fund belonging to his ward, he should be denied compensation, there being no excusatory facts. *In re Anderson*..... 688

3. **SAME—ACCOUNTING—CONVERSION—INTEREST.** Where a guardian used the funds of his ward for his personal use, keeping no account, he is liable for interest, regardless of the fact that he made no profit. *In re Anderson*..... 688

**HARMLESS ERROR:**

In civil actions, see **APPEAL AND ERROR**, 18-23.

In criminal prosecution, see **CRIMINAL LAW**, 17, 18.

**HIGHWAYS:**

Accidents at railroad crossings, see **RAILROADS**, 1-4.

1. **HIGHWAYS—DEFECTS—INJURIES—LIABILITY OF TOWNSHIPS.** Since townships organized under Const., art. 11, § 4, are, by Rem. Code, §§ 9322-9438, made bodies corporate, and vested with full control over highways to the exclusion of the county proper, with power to raise funds to keep them in repair, the township is liable for injuries caused by reason of the defective condition of its highways, under Rem. Code, §§ 950, 951, making counties, incorporated towns, school districts, and other public corporations, liable for "an injury to the rights of the plaintiff arising from some act or omission" of such public corporation. *Orrock v. South Moran Township*.... 144

**HUSBAND AND WIFE:**

See **DIVORCE**.

Filing by wife of claim against city for injuries, see **MUNICIPAL CORPORATIONS**, 32.

1. **HUSBAND AND WIFE—COMMUNITY PROPERTY—LIABILITY FOR TORT OF HUSBAND.** Since the liability of the community for the torts of the husband rest upon the statutory agency of the husband and exists only where the rule of *respondeat superior* applies, the community personalty is not liable for a judgment against the husband for alienating the affections of plaintiff's wife. *Schramm v. Steele* ..... 309
2. **SAME—COMMUNITY PROPERTY—LIABILITY FOR SEPARATE DEBTS—AGENCY OF HUSBAND—STATUTES.** Neither the husband nor wife having any independent proprietary interest in the community property, either real or personal, Rem. Code, § 5917, giving the husband the management and control of the community personal property, with like power of disposition as he has of his separate personal



**HUSBAND AND WIFE—CONTINUED.**

property, must be construed to be a management and control in the community interest, and merely vests him with absolute discretion in the voluntary disposition of the community personalty, and does not subject the same to involuntary sale to satisfy the husband's separate debts (overruling *Powell v. Pugh*, 13 Wash. 577, *Gund v. Parke*, 15 Wash. 393, and *Morse v. Estabrook*, 19 Wash. 92). *Schramm v. Steele*..... 309

**IDENTITY:**

Of accused, proof of, see **BURGLARY**.  
Of accused, evidence of, see **CRIMINAL LAW**, 5.

**IMPEACHMENT:**

Of witness, see **WITNESSES**, 4.

**IMPRISONMENT:**

For contempt, see **CONTEMPT**, 2.

**IMPROVEMENTS:**

Public improvements, see **MUNICIPAL CORPORATIONS**, 5-18; **STATES**.

**INDEMNITY:**

See **PRINCIPAL AND SURETY**.  
Right of contractor to contribution from city for damages paid injured employee, see **CONTRIBUTION**.

**INDICTMENT AND INFORMATION:**

Indorsement of new witnesses on information, see **CRIMINAL LAW**, 8.  
Violation of liquor laws by druggist, see **INTOXICATING LIQUORS**, 8, 9.  
Information for blackmail, see **THREATS**, 1.

1. **INDICTMENT AND INFORMATION—DUPLICITY—PENDING PLEA.** The question of duplicity in an information can only be raised by demurrer or motion to quash, or by motion to compel an election, and same will not be entertained while a plea of not guilty is pending. *State v. Owen*..... 466

**INDORSEMENT:**

Of witnesses on information, see **CRIMINAL LAW**, 8.

**INFANTS:**

Conversion of estate of by guardian, see **GUARDIAN AND WARD**.

**INFORMATION:**

Criminal accusation, see **INDICTMENT AND INFORMATION**.

**INITIATIVE AND REFERENDUM:**

Filing of additional referendum petitions, see **STATUTES**, 1.  
Executive construction of initiative measure, see **STATUTES**, 2.

**INJUNCTION:**

1. **INJUNCTION—TRADE UNIONS—PICKETING—RIGHT TO PICKET.** Where plaintiffs' restaurant was picketed by labor unions, the pickets wearing cards which declared the place unfair to union labor, and the business and prospective purchasers were interfered with, and the only object of the picketing was to intimidate, not only the public, but the plaintiffs and force them to enter into a contract, the same will be enjoined as an unlawful interference with plaintiffs' business, regardless of whether it was peaceful or otherwise. *St. Germain v. Bakery & Confectionery Workers' Union No. 9 of Seattle* 282
2. **INJUNCTION—WRONGFUL INJUNCTION—ACTION ON BOND—ATTORNEY'S FEES—CONDITION PRECEDENT.** Attorney's fees incurred in an injunction suit cannot be recovered in an action upon the injunction bond when the injunction was not wrongful in its inception, and no motion was made to dissolve it when the necessity for it ceased, and it was not dissolved until judgment of dismissal of the action on final hearing. *Puget Sound Harbor No. 16 of the American Association of Masters and Pilots of Steam Vessels v. Aetna Accident & Liability Co.*..... 413

**INSOLVENCY:**

See **BANKRUPTCY.**

**INSTRUCTIONS:**

In criminal prosecutions, see **CRIMINAL LAW**, 10-14.  
In civil actions, see **TRIAL**, 2, 3.

**INSURANCE:**

1. **INSURANCE—REGULATION—POWERS OF COMMISSIONER—DISCRETION—REVIEW—MANDAMUS.** Under Rem. Code, § 6059-86, providing for permits to mutual insurance companies to write other classes of insurance, upon furnishing additional assets, if the "plans, terms, and conditions prescribed and adopted" be "found to be efficient and adequate" to meet its obligations, "of which the commissioner shall be the judge," mandamus will not lie to compel the insurance commissioner to issue a permit for fidelity and surety insurance, where the record fails to disclose what showing was made as to the efficiency and adequacy of its plans, etc., the only showing being as to the additional assets; since it cannot be determined that the commissioner's refusal was arbitrary or capricious; and in any event, he could only be compelled to exercise his discretion. *State ex rel. Mutual Union Insurance Co. v. Fishback*..... 565

**INTENT:**

Evidence of in prosecution for keeping liquors intended for unlawful sale, see **INTOXICATING LIQUORS**, 10.  
As element of blackmail, see **THREATS**, 2.

**INTERCOURSE:**

- Denial of as ground for divorce, see **DIVORCE**, 2.

**INTEREST:**

Liability of executors for, see **EXECUTORS AND ADMINISTRATORS**, 5.

Liability of defaulting guardian for, see **GUARDIAN AND WARD**, 3.

1. **INTEREST—OFFICER'S SALARY—DAMAGES.** Where a salary is fixed by law, the officer cannot recover interest on back salary retained from monthly payments, prior to the commencement of action therefor, as the same is recoverable only as damages. *Rhodes v. Tacoma* ..... 341

**INTERSTATE COMMERCE:**

Regulation, see **COMMERCE**.

**INTOXICATING LIQUORS:**

Interstate shipments of, see **COMMERCE**.

Title and subject of ordinance regulating prescription of liquors by physicians, see **MUNICIPAL CORPORATIONS**, 2.

1. **INTOXICATING LIQUORS—ILLEGAL SHIPMENT—CRIMINAL LIABILITY—SHIPPER.** One who, in the state of Illinois, delivers a shipment of liquor to a common carrier to be transported to this state, without having secured a permit as required by the prohibition law, Rem. Code, § 6262-1 *et seq.*, is criminally responsible therefor as a participant and instigator of the offense, if not as the actual shipper; there being no distinction between principals and accessories. *State v. Warburton* ..... 242
2. **SAME—ILLEGAL SHIPMENT—CRIMINAL LIABILITY—ACTS OF AGENT.** One who ships liquor into this state in violation of the prohibition law, through the instrumentality of an agent, is liable as though he had personally participated, although out of the jurisdiction; and a common carrier may be made the agent in this sense. *State v. Warburton* ..... 242
3. **SAME—ILLEGAL SHIPMENT—JURISDICTION—VENUE.** The shipment of liquor into this state in violation of the prohibition law, through the instrumentality of a common carrier, is a continuing act, cognizable in the jurisdiction where the shipment terminated, and the venue is properly laid at the place of termination. *State v. Warburton* ..... 242
4. **SAME—ILLEGAL SHIPMENT—STATUTES — CONSTRUCTION—"WITHIN" AND "INTO."** Rem. Code, § 6262-18, prohibiting the shipment of liquor "within" the state without first securing a permit therefor, prohibits shipments "into" the state, in view of the evident intent and purpose of the act as a prohibition measure supplanting former regulative provisions, the act providing with particularity how a permit may be obtained to ship liquors from places outside the state into the state. *State v. Warburton* ..... 242

## INTOXICATING LIQUORS—CONTINUED.

5. **INTOXICATING LIQUORS — SHIPMENTS — PERMITS — STATUTES.** Although a permit for the shipment of liquor into the state had been issued, the shipment would be illegal unless the permit were affixed to the parcel, as required by Rem. Code, § 6262-18. *State v. Great Northern R. Co.*..... 137
6. **INTOXICATING LIQUORS—SALE—DELIVERY—EVIDENCE—SUFFICIENCY.** A delivery of intoxicating liquor unlawfully sold is sufficiently proven where it appears that accused, after making the bargain to sell, said that he would leave the bottle with the liquor behind a broom in a certain place and that the purchaser found it there and took it away. *State v. Sullivan*..... 639
7. **SAME—OFFENSES—STATUTES—SALE.** The fact that a person procures alcohol of a druggist by making a false statement, in violation of the statute, does not make the sale, in strict compliance with the statute, unlawful. *State v. McCaskey*..... 401
8. **SAME—INFORMATION—TIME—MATERIALITY.** Upon a prosecution of a druggist for keeping intoxicating liquors intended for unlawful sale, on or about the 24th day of March, evidence of the presence of liquors on the premises four days later is admissible, inasmuch as it is provided by statute that the precise time is not a material allegation. *State v. McCaskey*..... 401
9. **INTOXICATING LIQUORS—SALE—INFORMATION.** An information for selling a quart of "spirituous intoxicating liquors . . . capable of being used as a beverage," is sufficient as being substantially in the language of Rem. Code, §§ 6262-2 and 6262-4, prohibiting the sale of any intoxicating liquor. *State v. Sullivan*..... 639
10. **INTOXICATING LIQUORS—OFFENSES—INTENT — EVIDENCE — ADMISSIBILITY.** Upon the prosecution of a druggist for keeping intoxicating liquors intended for unlawful sale, the quantity and kind of liquor kept on hand by the defendant is material, but not conclusive, to show that he had in possession quantities and kinds in excess of his apparent needs. *State v. McCaskey*..... 401
11. **INTOXICATING LIQUORS—PROSECUTION—ISSUES AND PROOF.** Upon a prosecution of a druggist for keeping intoxicating liquors named in the information, intended for unlawful sale, it is error to admit evidence of the sale of alcohol, not specified in the information, as a circumstance bearing on the guilt of the accused; especially where the sale of alcohol was made for mechanical purposes in strict compliance with the law. *State v. McCaskey*..... 401
12. **INTOXICATING LIQUORS—OFFENSES—PHYSICIANS — UNLAWFUL PRESCRIPTIONS—EVIDENCE—ADMISSIBILITY.** In the prosecution of a physician for prescribing intoxicating liquors without good reason to believe that the patient was sick and required the liquor as medicine, evidence is admissible of the number of prescriptions given by

**INTOXICATING LIQUORS—CONTINUED.**

- the defendant to various persons about the same time, upon the issue as to the defendant's good faith. *Everett v. Cowles*..... 396
13. **SAME—EVIDENCE—SUFFICIENCY.** A conviction of a physician for prescribing intoxicating liquors without good reason to believe that the patient was sick and required the liquor as medicine, is sustained by evidence that, during six weeks the defendant gave 673 prescriptions, usually for one quart, and as many as 40 in one day, and made a very superficial examination of the prosecuting witness. *Everett v. Cowles*..... 396
14. **INTOXICATING LIQUORS — OFFENSES — KEEPING LIQUORS — PUNISHMENT—STATUTES.** Rem. Code, § 6262-5, authorizes fine and imprisonment, as well as an abatement of the premises, for unlawfully keeping intoxicating liquors for sale, the one penalty being directed against the premises and the other against the violator; in view of the fact that it makes such act unlawful and provides for abatement of the nuisance "upon conviction of any violation of the act," and for the giving of a bond, conditioned to pay all "fines, costs, and damages" that may be assessed; since § 6262-5, recognizes that a fine may be imposed for its violation without specific mention of the extent of the fine, and the amount is therefore controlled by § 6262-31, which provides that upon conviction of any violation of the act where the punishment is not specifically provided for, there may be imposed a fine of not less than \$50 nor more than \$250, or imprisonment for not less than ten days, nor more than three months, or both such fine and imprisonment. *State v. Clancy*..... 410

**ISSUES:**

In civil actions, see **PLEADING**, 4.

**JITNEYS:**

Liability on jitney bond for wrongful death, see **DEATH**.

Liability of surety on jitney bus bond, see **MUNICIPAL CORPORATIONS**, 19.

**JOINDER:**

Of causes of action, see **ACTION**.

**JOINT TORT FEASORS:**

Right to contribution, see **CONTRIBUTION**.

**JUDGES:**

Mandamus to judge, see **MANDAMUS**.

Conduct of at civil trial, see **TRIAL**, 1.

Assumption of facts in charge to jury, see **TRIAL**, 2.

**JUDGMENT:**

Review, see **APPEAL AND ERROR**.

In divorce, see **DIVORCE**, 6-11.

Condemnation proceedings, vacation of, see **EMINENT DOMAIN**.

## JUDGMENT—CONTINUED.

- For costs against administrator, presentment of claim for, see **EXECUTORS AND ADMINISTRATORS**, 1.
- Against husband for alienation of affections as community debt, see **HUSBAND AND WIFE**, 1.
- Personal judgment for deficiency on foreclosure, see **MORTGAGES**, 4.
- On pleadings, see **PLEADING**, 3.
- Against principal as conclusive upon surety, see **PRINCIPAL AND SURETY**, 1.
- In action against unions for picketing place of business, see **TRADE UNIONS**.

1. **JUDGMENT—DEFAULT—VACATION OF DEFAULT—FRAUD—PETITION—SUFFICIENCY.** The holder of a prior unrecorded mortgage is entitled to the vacation of a default judgment foreclosing his rights at the suit of a subsequent mortgagee having notice and conspiring with the mortgagor, where it appears that he did not understand the English language, and was told that the papers served were a summons to appear as a witness and that the attorney was protecting his interests; and a petition for the vacation setting forth such facts is sufficient to require the court to take testimony to determine whether there exists substantial evidence to sustain *prima facie* the allegations. *Paltro v. Gavenas*..... 327
2. **JUDGMENT—VACATION—JURISDICTION.** The superior court has jurisdiction of the subject-matter of the vacation of judgments, and final orders therein are as conclusive as other judgments. *Barker v. Seattle* ..... 511
3. **SAME—VACATION—MERITORIOUS DEFENSES—COMPLAINT—SUFFICIENCY.** A complaint in an action to vacate a default judgment for personal injuries sufficiently sets forth that the defendant has a meritorious defense, where many material allegations on which the judgment was based are specifically denied and in detail alleged to be untrue to the knowledge of the party making them. *Chehalis Coal Co. v. Laisure*..... 422
4. **SAME—VACATION—AFFIDAVITS OF MERITS—NECESSITY.** The rule that equity will set aside a judgment absolutely void for lack of service on evidence aliunde the record, without a showing of merits, does not apply to a judgment that was simply voidable, because prematurely entered without notice, after appearance by the defendant during the pendency of a motion, in which case it must be shown that the defendant has a valid defense on the merits and that there is substantial evidence to support the allegations. *Chehalis Coal Co. v. Laisure*..... 422
5. **SAME.** In proceedings under the statute to set aside a voidable judgment for mistake or surprise under Rem. Code, § 303, or for irregularity or fraud in obtaining it under § 464, it is necessary to meet in addition the provisions of § 469, requiring an adjudication that there is a valid defense. *Chehalis Coal Co. v. Laisure*.... 422

## JUDGMENT—CONTINUED.

6. **SAME—LIMITATIONS—DISCOVERY OF FRAUD.** Where it is sought to set aside a judgment for fraud and irregularity in obtaining it, for grounds specified in Rem. Code, § 464, it is a general rule that the parties must bring themselves within the terms and conditions of the statute; but the application may be made by an independent suit in equity, where a failure to discover the ground within the time limited by the statute is traceable to fraud or concealment of the adverse party. *Chehalis Coal Co. v. Laisure*..... 422
7. **JUDGMENT — VACATION — DIRECT ATTACK — EVIDENCE.** A suit in equity to set aside a judgment is a direct attack in which evidence *de hors* the judgment roll is admissible. *Chehalis Coal Co. v. Laisure* ..... 422
8. **SAME — VACATION — FRAUD — EVIDENCE — SUFFICIENCY.** Where a judgment for personal injuries was taken without notice after appearance by the defendant and during the pendency of a motion, by substituted attorneys for the plaintiff who had no notice of the defendant's appearance, and the original attorneys for plaintiff had not informed the client of the defendant's appearance, the plaintiff was guilty of fraud in procuring the judgment, since he was chargeable with the knowledge of his original attorneys. *Chehalis Coal Co. v. Laisure*..... 422
9. **JUDGMENT—IN ANOTHER STATE ON WARRANT OF ATTORNEY.** Under the full faith and credit clause of the Federal constitution, judgments upon confession under warrant of attorney are valid here when rendered in strict conformity with the power and in the state where the debtor resided when the warrant was executed, and are not open to collateral attack. *Cowen v. Culp*..... 480
10. **SAME—ON WARRANT OF ATTORNEY—VALIDITY—PRESENT INDEBTEDNESS.** A judgment upon confession under warrant of attorney is founded upon the fact of present indebtedness, and payment of the note before judgment would render the judgment void and subject to attack in any court. *Cowen v. Culp*..... 480
11. **JUDGMENT—PARTIES CONCLUDED.** A decision on appeal in a former action between the same parties as to the sufficiency of a claim filed against an estate is conclusive in a subsequent action. *Gray v. Hickey* ..... 278

## JURISDICTION:

See PROHIBITION.

Appellate jurisdiction, see APPEAL AND ERROR, 1, 2, 5.

In contempt proceedings, see CONTEMPT, 2.

Criminal prosecutions, see CRIMINAL LAW, 3.

To modify decree awarding alimony, see DIVORCE, 6, 9, 11.

To vacate judgment awarding damages, see EMINENT DOMAIN, 1, 2.

Venue of prosecution for illegal shipment of liquor into state, see INTOXICATING LIQUORS, 3.

For relief against judgment, see JUDGMENT, 2.

**JURY:**

Instructions in criminal prosecutions, see **CRIMINAL LAW**, 10-14.

Misconduct ground for new trial, see **NEW TRIAL**.

Instructions in civil actions, see **TRIAL**, 2, 3.

Verdict in civil actions, see **TRIAL**, 6.

1. **JURY—QUALIFICATIONS—BIAS.** A juror is not disqualified by acquaintance with the prosecuting attorney and confidence in his ability and integrity. *State v. Sullivan*..... 639
2. **SAME.** In a prosecution for selling liquor, a juror is not disqualified by the fact that she favors the prohibition law. *State v. Sullivan* ..... 639

**JUSTICES OF THE PEACE:**

Jurisdiction in criminal prosecutions, see **CRIMINAL LAW**, 2, 3.

**LABOR LIENS:**

Foreclosure as bar to subsequent action, see **ELECTION OF REMEDIES**, 2.

On saw logs, see **LOGS AND LOGGING**.

**LACHES:**

Of vendee in contract induced by fraud, see **SALES**, 3.

In failing to discover secret purchase of land by agent, see **TRUSTS**, 2.

**LANDLORD AND TENANT:**

See **FORCIBLE ENTRY AND DETAINER**.

Rights of purchaser to rents during period of redemption, see **MORTGAGES**, 6.

**LAST CLEAR CHANCE:**

To avoid collision at crossing, see **RAILROADS**, 3, 4.

**LAW OF THE CASE:**

See **APPEAL AND ERROR**, 24.

**LICENSES:**

On telephone poles as impairing obligation of franchise granted by city, see **CONSTITUTIONAL LAW**, 3.

Dissolution of corporation for failure to pay license fees, see **CORPORATIONS**, 5-8.

1. **LICENSES — POLICE POWERS — REGULATING PUBLIC CORPORATIONS — TELEGRAPH AND TELEPHONE COMPANIES—CHARGE FOR POLES.** The provision in a city charter and ordinances requiring telegraph and telephone companies to pay a license tax of fifty cents for each pole maintained in use in any street or alley of the city cannot be sustained as a police regulation under the rule that a city has power to exercise control over the business and occupations of public corporations where reasonable necessity exists and charge the reason-



LICENSES—CONTINUED.

able cost thereof, where there was no law, charter, or ordinance providing for any regulation or supervision over the property of such corporations; since the tax or charges must be reasonably commensurate with the expense of regulation and in pursuance of some general or special statute or ordinance prescribing the purposes to which they were applied. *Pacific Telephone & Telegraph Co. v. Everett* ..... 259

2. SAME—"OCCUPATION TAXES"—WHAT ARE—CHARGE ON TELEGRAPH AND TELEPHONE POLES. A charge of fifty cents for each telegraph or telephone pole maintained for use in any city street or alley is not a tax upon occupations or business, under the rule in this state authorizing license taxes thereon in addition to general taxation; since it does not purport to be such, and the amount is not graduated by the amount of business done, nor is the sum fixed for the privilege of doing business. *Pacific Telephone & Telegraph Co. v. Everett* ..... 259

LIENS:

Loggers' liens, see LOGS AND LOGGING.

LIMITATION OF ACTIONS:

Time to sue out writ of error to operate as supersedeas, see APPEAL AND ERROR, 6.

On claim for overcharges by carrier, see CARRIERS.

Vacation of judgment for fraud, see JUDGMENT, 6.

1. LIMITATION OF ACTIONS—RELIEF ON THE GROUND OF FRAUD—CONSTRUCTIVE TRUSTS—DISCOVERY OF FRAUD. A constructive trust in favor of a principal for land secretly acquired by the agent continues until discovery of the circumstances giving rise to the trust; and action therefor is not barred until three years thereafter, under Rem. Code, 159, relating to actions for relief upon the ground of fraud. *Ackerson v. Elliott*..... 31
2. LIMITATION OF ACTIONS—FRAUD—DISCOVERY—ACTION BY WARD. Where a guardian, having converted the funds of his ward, contrived to "borrow" the sum of him at final settlement, the statute of limitations does not run against the ward until three years after discovery of the fraud. *In re Anderson*..... 688

LOANS:

To guardian by ward, see GUARDIAN AND WARD, 1.

To contractor on public work, see STATES, 3.

LOCAL PREJUDICE:

Ground for change of venue, see CRIMINAL LAW, 1.

LOGS AND LOGGING:

1. LOGS AND LOGGING—LABORERS' LIENS—PRIORITY OVER GARNISHMENT. Where laborers had prior liens upon saw logs, which were

## LOGS AND LOGGING—CONTINUED.

sold and sawed up and produced a fund which it was the duty of the purchaser to apply in satisfaction of the liens, a garnishment of the purchaser is ineffectual, even though the logs were in the purchaser's possession at the time the writ was served and answered; Rem. Code, § 1206, giving priority to the laborers' liens. *Du Bois Lumber Co. v. Dietderich*..... 1

2. LOGS AND LOGGING—LIENS—WAIVER—SALE AND APPROPRIATION OF PURCHASE MONEY. Laborers' liens on logs are not waived by an agreement allowing a purchaser to advance freight and booming expenses and saw the logs prior to execution sale, where no one was prejudiced, in view of Rem. Code, § 1177, making it the duty of the purchaser of liened logs to apply the purchase money to the satisfaction of *bona fide* liens; and this applies to liens for which no suit to foreclose had been instituted. *Du Bois Lumber Co. v. Dietderich* ..... 1

## MALPRACTICE:

See PHYSICIANS AND SURGEONS.

## MANDAMUS:

To compel insurance commissioner to issue permit to write other classes of insurance, see INSURANCE.

1. MANDAMUS—WHEN LIES—TO COURT—REMEDY BY APPEAL. Mandamus lies to compel a superior court judge to enter a judgment of dismissal, after sustaining a challenge to the sufficiency of the evidence, under Rem. Code, §§ 1014 and 1015, providing that the writ shall issue to compel the performance of a legal duty when there is no plain, speedy, and adequate remedy in the course of law. *State ex rel. Stone v. Superior Court*..... 172

## MANDATE:

To lower court on decision on appeal, see APPEAL AND ERROR, 26, 27.

## MARRIED WOMEN:

See HUSBAND AND WIFE.

## MASTER AND SERVANT:

1. MASTER AND SERVANT—EXISTENCE OF RELATION. The purchaser of junk, who was injured by the fall of holisting tackle on the seller's premises, where he went in his own interests to help the seller's servants fill the order, does not in any sense stand in the relation of a servant to whom the seller owed a duty to furnish safe appliances. *McClellan v. Schwartz*..... 417
2. MASTER AND SERVANT—INJURY TO THIRD PERSON—SCOPE OF EMPLOYMENT. The driver of a delivery truck employed to make deliveries of goods acts outside of the scope of his employment, where he, for his own pleasure, invited girls to ride a short distance on the

**MASTER AND SERVANT—CONTINUED.**

- running board of the car; and the employer is not liable for injuries sustained through the negligence of the driver. *McQueen v. People's Store Co.*..... 387

**MEASURE OF DAMAGES:**

For fraud inducing purchase of land, see FRAUD, 11.

**MECHANICS' LIENS:**

- Foreclosure as bar to subsequent action, see ELECTION OF REMEDIES, 2.
- Laborers' liens on logs, see LOGS AND LOGGING.
- Priority of mortgage, see MORTGAGES, 2, 3.
- Claims against contractor's bond, see STATES.

**MINES AND MINERALS:**

Taxation of coal lands, see TAXATION, 5.

**MISREPRESENTATION:**

- See FRAUD.
- By corporate officer at receiver's sale, see CORPORATIONS, 4.
- By receiver or agent of at sale, see RECEIVERS, 4.
- Inducing sale, see SALES, 2-4.
- Of vendor on sale of land, see VENDOR AND PURCHASER, 1, 3, 4.

**MODIFICATION:**

Of decree in divorce, see DIVORCE, 6, 9-11.

**MONEY RECEIVED:**

Recovery of tax paid, see TAXATION, 6, 7.

**MORTGAGES:**

- Personal property, see CHATTEL MORTGAGES.
- Vacation of default judgment foreclosing rights of holder of prior unrecorded mortgage, see JUDGMENT, 1.
- Priority of claims in receivership, see RECEIVERS, 6.
- Venue of action to cancel mortgage, see VENUE.
- 1. MORTGAGES—EQUITABLE MORTGAGE—REQUISITES—POWER OF ATTORNEY. Under Rem. Code, §§ 8745, 8746, 8750, requiring all conveyances of real estate or any interest therein and all contracts creating any incumbrance upon real estate to be by deed, and all deeds to be in writing, signed by the party to be bound and acknowledged, an irrevocable power of attorney to receive and hold in trust, as collateral security, an heir's interest in an estate, does not constitute an equitable mortgage upon the interest of the heir in real property inherited by him; since it contains no word of grant referring to the title to real property, or giving the attorney power to convey the same, and since his intent to incumber the property must, in the light of the statute of frauds, be found in the writing itself. *In re Springer's Estate*..... 546

## MORTGAGES—CONTINUED.

2. **MORTGAGES—PRIORITY—MECHANICS' LIENS.** Where the contractor, at the time of entering into the contract, knew that a mortgage was to be given as a prior lien to raise money to pay for the work, the mortgage is prior to the claims of the contractor, although work was commenced before the mortgage was executed and filed, notwithstanding Rem. Code, § 1132, providing that a mechanics' lien is preferred to any incumbrance attaching subsequent to the commencement of the work. *Jahn & Co. v. Mortgage Trust & Savings Bank* ..... 504
3. **SAME.** Under Rem. Code, § 1132, providing that a mechanics' lien is preferred to any incumbrance attaching subsequent to the commencement of the work for which the lien is given, a mortgage given to raise money to pay bills and expenses incurred in the progress of the work, but filed subsequent to the commencement of work on the building, is superior to claims for materials furnished to the contractor long after the mortgage was made and recorded. *Jahn & Co. v. Mortgage Trust & Savings Bank*..... 504
4. **MORTGAGES — ASSUMPTION OF MORTGAGE — CONTRACT — EVIDENCE.** Where a contract for the purchase of land contained no provision for the assumption of a mortgage, the purchaser cannot be made liable on a deficiency judgment from the fact that a deed in blank had been executed containing an assumption of the mortgage, where the deed was not delivered or its contents made known to the purchaser. *Magallon v. Schreiner*..... 15
5. **MORTGAGES—FORECLOSURE—SALE—POSSESSION — RIGHTS OF SECOND MORTGAGEE—WRIT OF ASSISTANCE.** Where a second mortgagee foreclosed against the mortgagors only, and prior to his obtaining possession as purchaser under the sale, a prior mortgage was foreclosed and the purchaser at such sale obtained possession, the second mortgagee has rights as a redemptioner only, and is not entitled to a writ of assistance to put him in possession. *State ex rel. Warner v. Superior Court*..... 472
6. **MORTGAGES—FORECLOSURE—SALE—TITLE OF PURCHASER DURING REDEMPTION PERIOD—RENTS—STATUTES.** A mortgage foreclosure sale does not, pending the period of redemption, terminate an unexpired lease, since it does not vest absolute title, in view of Rem. Code, § 600, providing that the purchaser, during the period of redemption, shall be entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation, accounting therefor in case of redemption, and § 601, providing that the court may restrain the commission of waste during such period, and § 602, providing that the purchaser shall be entitled to possession until redemption, unless the property is in the possession of a tenant holding under an unexpired lease, and entitled to receive the rents from such tenant; otherwise the lease might be prematurely termi-

**MORTGAGES—CONTINUED.**

nated to the detriment of the mortgagor making redemption. *Virges v. Gregory Co.* ..... 333

**MOTIONS:**

Review of errors as dependent on specific motions below, see **APPEAL AND ERROR**, 4.

For judgment on pleadings, see **PLEADING**, 3.

Direction of verdict in civil actions, see **TRIAL**, 5.

**MOVING PICTURES:**

Regulation of, see **THEATERS AND SHOWS**.

**MUNICIPAL CORPORATIONS:**

Acceptance of less salary by officer as accord and satisfaction, see **ACCORD AND SATISFACTION**.

Power of attorney to bind city by stipulation in eminent domain proceeding, see **ATTORNEY AND CLIENT**, 1.

License tax on telephone poles as impairing obligation of franchise, see **CONSTITUTIONAL LAW**, 3.

Agreement by officer to accept less than fixed salary as violating public policy, see **CONTRACTS**, 1.

Right of contractor to contribution from city for damages paid to injured employee, see **CONTRIBUTION**.

Vacation of judgment awarding damages in condemnation proceeding, see **EMINENT DOMAIN**.

Right of officer to recover interest on back salary retained from monthly payments, see **INTEREST**.

License tax on telegraph and telephone poles in streets of city, see **LICENSES**.

Street railroads, see **STREET RAILROADS**.

Regulation of moving picture shows, see **THEATERS AND SHOWS**.

1. **MUNICIPAL CORPORATIONS—PORT DISTRICTS — POWERS — OPERATING RAILWAYS—STATUTES—RAIL AND WATER TRANSFER AND TERMINAL FACILITIES.** Rem. Code, §§ 8165-1 and 8165-4, creating port districts as municipal corporations, and authorizing them to construct, acquire, maintain and operate, sea walls, wharves, docks, ferries, and locks "and other harbor improvements, rail and water transfer and terminal facilities" does not include a belt railway line to be operated by the port as a common carrier; since the power is not expressly granted, or fairly implied or incidental or essential to the powers granted, which from the tenor of the whole act, indicate the quoted words were intended to apply simply to means for the transshipment of commodities between water carriers and land carriers. *State ex rel. Huggins v. Bridges*..... 553

2. **MUNICIPAL CORPORATIONS—ORDINANCES—TITLE AND SUBJECTS.** A provision in an ordinance regulating the prescription of intoxicating liquors by a physician is germane to a title reciting that it re-

## MUNICIPAL CORPORATIONS—CONTINUED.

- lates to the sale and disposition of intoxicating liquors. *Everett v. Cowles* ..... 396
3. MUNICIPAL CORPORATIONS—OFFICERS—ORDINANCES — CONSTRUCTION. The “manager” of a sub-department of the light department of a city, provided for by ordinance, who was to be nominated by a commissioner and confirmed by the council, is an “officer” of the city within charter provisions classifying all persons in the service of the city and providing for a class of appointive officers to be so nominated and confirmed and to include named officers and “such other chiefs or superintendents of departments as the council shall by ordinance . . . create or establish.” *Rhodes v. Tacoma* 341
4. MUNICIPAL CORPORATIONS—OFFICERS—SALARY—RIGHT TO — ACCEPTANCE. Where an officer’s salary is fixed by ordinance, which could be repealed or suspended only by ordinance, he is entitled to recover the full salary, notwithstanding the officer appointing him informed him that he would receive a less salary, and for a period of over two years he accepted monthly salary warrants acknowledging payment in full for services rendered. *Rhodes v. Tacoma*..... 341
5. MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTS—CONSTRUCTION—DEMURRAGE—DEFENSES. A contractor for port terminals cannot escape the payment of demurrage for delay caused by another contractor, where the contract signed by him provided that the port should not be answerable to one contractor for any damage or loss suffered through the fault of any other contractor, and it is immaterial that such clause was not in the specification upon which he submitted his bid. *Droppelman v. Port of Seattle*..... 177
6. SAME. A contractor for port terminals cannot escape the payment of demurrage for delay caused by the unwarranted rejection of material by an inspector, where he had signed an agreement with the port in settlement of the matter expressly declaring that the port was not responsible for the delay. *Droppelman v. Port of Seattle* ..... 177
7. SAME. Where, upon a dispute as to demurrage due from a contractor for port terminals, the parties agreed upon the stipulated damages to that date, in order to enable the contractor to go ahead with the work, payments thereafter made on the contract do not waive the demurrage then agreed upon. *Droppelman v. Port of Seattle* ..... 177
8. SAME — DEMURRAGE — DELAY — EVIDENCE. Upon an issue as to whether a contractor was responsible for delay whereby demurrage attached, the evidence of a former engineer who had resigned, to the effect that he would have advised waiver of the demurrage, on a “broad basis of general human fairness,” is immaterial, especially where his testimony indicates that the contractor was responsible for the delay. *Droppelman v. Port of Seattle*..... 177

## MUNICIPAL CORPORATIONS—CONTINUED.

9. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—STIPULATIONS. At the trial of condemnation proceedings, the parties have the power by stipulation to modify a preceding agreement or walver in the owner's petition for the improvement. *Richardson v. Seattle* ..... 371
10. SAME—ASSESSMENT FOR BENEFITS—PROPERTY SUBJECT — PRESENT USE. A railroad company cannot object to an assessment of benefits from the opening of a street that the present use of its property was such that it derived no special benefit from the improvement; since the future use of the property may be considered. *In re West Wheeler Street* ..... 669
11. MUNICIPAL CORPORATIONS—IMPROVEMENTS — ASSESSMENTS — BENEFITS—EVIDENCE—SUFFICIENCY. An assessment for benefits from the condemnation of an alley is not shown to have been excessive, or upon a fundamentally wrong basis because the commissioners considered the benefit to an adjoining lot used in connection with the lot assessed, where there was no evidence or inference that any benefit to such adjoining lot was considered, and the assessment objected to was less than the amount assessed to other property similarly situated. *Hoquiam v. Moe*..... 99
12. MUNICIPAL CORPORATIONS—ASSESSMENTS — CONCLUSIVENESS — ACTION TO CANCEL. Under Rem. Code, § 7892-23, providing that the confirmation of an assessment roll by the city council shall be conclusive, and § 7892-70, expressly saving all actions or proceedings which may be pending, the rule does not apply to prevent an action to cancel an invalid assessment in proceedings which were begun long prior to the enactment of the statute. *Richardson v. Seattle*.... 371
13. SAME—ASSESSMENTS — ESTOPPEL. Where in condemnation proceedings the city attorney stipulated that no damages should be paid and no assessments levied, and the city ratified the agreement by striking the assessment from the rolls, and accepted the benefits, it is estopped to assert jurisdiction years afterwards to levy and confirm an assessment for the improvement. *Richardson v. Seattle* 371
14. MUNICIPAL CORPORATIONS—IMPROVEMENTS—REASSESSMENTS—STATUTES. Under Rem. Code, § 7812, authorizing a reassessment, if any assessment be annulled or set aside by any court or be held invalid for any cause, where a judgment partially annulled an assessment, a reassessment may be made to supply the deficiency created, to the extent of benefits received, and extended over that portion of the original assessment which was not invalidated by the judgment and which is still a valid and subsisting assessment. *In re West Wheeler Street* ..... 669
15. MUNICIPAL CORPORATIONS—ASSESSMENTS—WARRANTS—LIABILITY—FAILURE TO PROVIDE FUND. The failure of a city to provide a local assessment fund for the payment of a warrant given in satisfaction

## MUNICIPAL CORPORATIONS—CONTINUED.

of a judgment for damages payable out of the fund, does not make the warrant a general fund warrant. *Barker v. Seattle*..... 511

16. MUNICIPAL CORPORATIONS — LOCAL IMPROVEMENTS — BONDS — PAYMENT—STATUTES. Where local improvement bonds were issued under ordinances and the law of 1899, p. 238, § 9, providing that each bond should be payable only out of the local improvement fund and that there should be no claim thereon against the city, except by enforcement of the special assessment, the city council had no power to provide for their payment, in case of a deficit, by the creation of a local improvement district surplus fund, made up from the surplus moneys in the funds of improvement districts, the bonds to be assigned to the city, nor in any other way than as limited by law to the special assessments against the property. *State ex rel. National Bank of Tacoma v. Tacoma*..... 190
17. SAME. A local improvement district surplus fund, for the payment of deficits in local improvement funds, which is "subject to disposition by the city as it shall see fit" is absolutely within the city's discretion, which, in the absence of fraud or arbitrary mismanagement, cannot be controlled by mandate in the interest of bondholders seeking to have the same applied to the payment of their bonds. *State ex rel. National Bank of Tacoma v. Tacoma* 190
18. SAME—REPRESENTATION—STATEMENTS BY OFFICERS. A city treasurer and councilman has no power to bind the city by a statement or representation to a purchaser of local improvement bonds, buying the same from a contractor, which would set aside the provisions of the law or ordinances or enlarge the liability of the city. *State ex rel. National Bank of Tacoma v. Tacoma*..... 190
19. MUNICIPAL CORPORATIONS—STREETS—JITNEYS — LIABILITY ON BOND —STATUTES. Under Rem. Code, § 5562-38, requiring a jitney bus operator to give bond conditioned to pay all damages which may be sustained by any person injured by his negligence, and § 5562-39 giving a cause of action against the principal and the surety on the bond "to every person injured . . . for all damages sustained" the same elements of damages for which recovery may be had against the principal enter into and form a part of the liability of the surety. *Bruner v. Little*..... 319
20. MUNICIPAL CORPORATIONS—STREETS—DEFECTS—DUTY TO REPAIR. A city is bound to keep in repair a reasonable way along an ungraded street that has, to the knowledge of the city, been in constant use by the public for more than ten years and which it has recognized as a public street. *Richardson v. Seattle*..... 521
21. SAME—STREETS—OBSTRUCTING SIDEWALKS—NEGLIGENCE. It is negligence for a city to place a water pipe, an inch or more in diameter, across a sidewalk, without protecting it at night in any way. *Blackwell v. Seattle*..... 679



## MUNICIPAL CORPORATIONS—CONTINUED.

22. SAME—DEFECTS—IMPLIED NOTICE—OTHER ACCIDENTS. Implied notice on the part of the city of a defect in a street is sufficiently shown by evidence that the defect had caused previous accidents. *Richardson v. Seattle* ..... 521
23. SAME—STREETS—JITNEYS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. Where a child of tender years, killed by a jitney bus, tarried at the street curb, and looked up and down the street before attempting to cross, it cannot be said as a matter of law that she was guilty of contributory negligence in attempting to cross without taking any precautions for her safety. *Bruner v. Little*.... 319
24. SAME—STREETS—DEFECTS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. The driver of a one-horse wagon coming down a steep grade, who was thrown to the ground when a wheel dropped into a chuck hole filled with water, is not guilty of contributory negligence as a matter of law, where he used all the care possible in coming down the descent and did not know of the existence of the hole, which he could not see on account of the water in it. *Richardson v. Seattle* ..... 521
25. MUNICIPAL CORPORATIONS — STREETS—JITNEYS — NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. The negligence of the operator of a jitney bus, who ran down and killed a child, is a question for the jury, where there was evidence that the brakes of the car were defective and that he was exceeding the speed limit, with other evidence from which negligence could reasonably be inferred. *Bruner v. Little* 319
26. MUNICIPAL CORPORATIONS—STREETS—DEFECTS—NEGLIGENCE — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The negligence of the city and the contributory negligence of the owner of a truck, overturned at the foot of a steep pitch, where the city had left broken and uneven planking and a hole six or seven inches deep that filled with water, are questions for the jury, where the city had notice of the defect, other accidents had happened there, and the plaintiff, who was familiar with the street, but had to use it, used all the care possible in going down the grade, and his brake, renewed that day, failed to hold owing to the slippery condition of the street, whereby the truck gained momentum and tipped over when it reached the hole in the street. *Walters v. Seattle*..... 657
27. SAME—STREETS—OBSTRUCTIONS—CONTRIBUTORY NEGLIGENCE. It is not, as a matter of law, contributory negligence to trip over a water pipe, an inch or more in diameter, left across a sidewalk without protection of any kind. *Blackwell v. Seattle*..... 679
28. SAME—DEFECTS IN STREETS—PERSONAL INJURIES—ACTIONS—TRIAL—INSTRUCTIONS. In an action for personal injuries from a defect in a street, an instruction that, if the city's negligence was the proximate cause of the injury, the plaintiff could recover, notwithstanding in operating a truck he was exceeding the speed limit, providing

## MUNICIPAL CORPORATIONS—CONTINUED.

- that fact was only a remote cause or a mere condition and not the proximate cause of the accident, is not contradictory of instructions that if plaintiff was negligent, it made no difference how negligent he was, and correctly defining the law of contributory negligence and plaintiff's degree of care and that any omission thereof which caused or contributed to or was the proximate cause of the injury, barred recovery. *Walters v. Seattle*..... 657
29. SAME. In such an action, in defining contributory negligence as to conditions that "plaintiff knew," it is not error to omit to instruct as to conditions that he "should have known," when there was no such element in the case. *Walters v. Seattle*..... 657
30. SAME. In such an action, instructions requiring the jury to determine whether the proximate cause of the accident was the defective condition of the street or the manner in which plaintiff drove his truck upon it, are correct. *Walters v. Seattle*..... 657
31. SAME. In such an action, it is proper to refuse an instruction assuming that an automobile is itself an agency dangerous to the occupant. *Walters v. Seattle*..... 657
32. MUNICIPAL CORPORATIONS—CLAIMS—PRESENTATION BY WIFE. The wife may make and file a claim for personal injuries against a city in her own name, where the husband and wife are living separate and apart and the husband was out of the state and did not return until after the time for filing a claim had expired. *Blackwell v. Seattle* ..... 679
33. SAME—CLAIMS—RESIDENCE OF CLAIMANT. A claim against a city stating the residence at which the claimant had lived "during the past year" complies with the requirement that the claim shall give the place of residence for six months immediately prior to the filing of the claim. *Richardson v. Seattle*..... 521
34. SAME—CLAIMS—DESCRIPTION OF PROPERTY—SUFFICIENCY. The wet and slippery condition of a precipitous approach to a street intersection, not imputable to the city but to the phenomena of nature, need not be set forth in a claim for damages due to defective planking and a hole at the street intersection, in order to entitle plaintiff to give evidence of such slippery condition, whereby plaintiff lost control of a truck in approaching the defects in the street; since the condition is presumably not permanent, and is one which the city is bound to consider. *Walters v. Seattle*..... 657

## MUTUAL INSURANCE COMPANIES:

Permits to write other classes of insurance, see INSURANCE.

## NAMES:

Canvass of names on referendum petition, see STATUTES, 1.

**NECESSITY:**

For affidavit of merits, on vacation of judgment, see JUDGMENT, 4.  
For findings of fact, see TRIAL, 7.

**NEGLIGENCE:**

Right to contribution for, see CONTRIBUTION.  
Cause of damages, see DAMAGES, 1.  
Causing death, see DEATH.  
Cause of injury on highway, see HIGHWAYS.  
Of employers, see MASTER AND SERVANT.  
Of person injured on street, see MUNICIPAL CORPORATIONS, 23, 24, 26-29.  
Cause of personal injuries in city street, see MUNICIPAL CORPORATIONS, 20-31.  
In treating patient, see PHYSICIANS AND SURGEONS.  
In operation of train at crossing, see RAILROADS, 1-4.  
Of person injured by operation of railroad, see RAILROADS, 2, 4.  
Destruction of property by fire from engine, see RAILROADS, 5, 6.

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE OF PARENT. It is not contributory negligence for parents to permit a child 8½ years old to cross a street unattended in the residential section of a city. *Bruner v. Little* ..... 319
2. NEGLIGENCE — PRESUMPTIONS — RES IPSA LOQUITUR. Where the cause of the fall of hoisting tackle was not shown, and the appliance was not shown to be defective, the defendant is not put to his proof upon the doctrine of *res ipsa loquitur*, which requires that the offending instrumentality be identified. *McClellan v. Schwartz*.. 417

**NEGOTIABLE INSTRUMENTS:**

See BILLS AND NOTES.

**NEWLY DISCOVERED EVIDENCE:**

Ground for new trial in criminal prosecution, see CRIMINAL LAW, 15.

**NEW TRIAL:**

Right to move for pending appeal, see APPEAL AND ERROR, 5.  
After remand on appeal, see APPEAL AND ERROR, 26, 27.  
In criminal prosecutions, see CRIMINAL LAW, 15.

1. NEW TRIAL—WAIVER. The right to a new trial is waived where the party had knowledge of acts constituting misconduct of the jury and prevailing party while absent on a view of the place of the accident, at the time they occurred, and failed to call the court's attention thereto prior to return of the verdict. *Hopkins v. Copalis Lumber Co.* ..... 119

**NONRESIDENTS:**

Service of process on, see PROCESS.

**NONSUIT:**

On trial, see **TRIAL**, 4, 5.

**NOTES:**

Promissory notes, see **BILLS AND NOTES**.

**NOTICE:**

Record of mortgage as notice, see **CHATTEL MORTGAGES**, 2.  
 Of assignment of warrant issued in satisfaction of condemnation award, see **EMINENT DOMAIN**, 3.  
 Of defects in streets, see **MUNICIPAL CORPORATIONS**, 22.  
 Claim for damages, see **MUNICIPAL CORPORATIONS**, 32-34.  
 Of cancellation of agency contract, see **PRINCIPAL AND AGENT**, 1.  
 Of action, see **PROCESS**.  
 Of receiver's sale, see **RECEIVERS**, 3.  
 School election, see **SCHOOLS AND SCHOOL DISTRICTS**, 2.  
 Of claim against contractor's bond, see **STATES**, 2-6.  
 Of fraud of agent inducing sale of land, see **TRUSTS**, 2, 3.

**OBJECTIONS:**

Necessity for purpose of review, see **APPEAL AND ERROR**, 3.  
 To depositions, see **DEPOSITIONS**.  
 To pleadings, see **PLEADING**, 1.

**OBLIGATION OF CONTRACT:**

Laws impairing, see **CONSTITUTIONAL LAW**, 2, 3.

**OBSTRUCTIONS:**

On city sidewalk, see **MUNICIPAL CORPORATIONS**, 21, 27.

**OCCUPATION TAX:**

See **LICENSES**.

**OFFICERS:**

- Acceptance of part of salary as accord and satisfaction, see **ACCORD AND SATISFACTION**.  
 Agreement by to accept less than legal salary as violating public policy, see **CONTRACTS**, 1.  
 Corporate officers, see **CORPORATIONS**, 4.  
 Right to recover interest on back salary retained from monthly payments, see **INTEREST**.  
 Municipal officers, see **MUNICIPAL CORPORATIONS**, 3, 4, 18.
1. **OFFICERS—RECALL—PETITION — WITHDRAWAL.** Electors signing a petition for the recall of a county commissioner have the right to withdraw their names prior to the date fixed by the county auditor for canvassing the names. *Rominger v. Nellor*..... 693

**OFFICERS—CONTINUED.**

2. **SAME—RECALL — PETITIONS — WITHDRAWAL OF NAMES — DUTY OF AUDITOR.** Petitions withdrawing the names of electors from a recall petition must be considered although the names were not initialed by the registration officers as required on the recall petitions, it being necessary only that the auditor satisfy himself that the person purporting to withdraw is the elector who signed the original petition. *Rominger v. Nellor*..... 693

**OPENING:**

Judgment, see **JUDGMENT**, 1-10.

**OPINION EVIDENCE:**

In civil actions, see **EVIDENCE**, 2.

**ORAL CONTRACTS:**

See **FRAUDS, STATUTE OF**.

**ORDERS:**

Review of, see **APPEAL AND ERROR**, 2.

**ORDINANCES:**

Municipal ordinances, see **MUNICIPAL CORPORATIONS**, 2-4.

Regulating moving picture shows, see **THEATERS AND SHOWS**.

**OVERCHARGE:**

Recovery of from railroad company, see **CARRIERS**.

**OWNERSHIP:**

Estoppel of parent to assert ownership of goods as against creditors of minor, see **ESTOPPEL**, 1.

**PARENT AND CHILD:**

Right of parent to sue on jitney bond for death of child, see **DEATH**.

Estoppel of parent to assert ownership of goods as against creditors of minor, see **ESTOPPEL**, 1.

Contributory negligence of parent, see **NEGLIGENCE**, 1.

**PAROL CONTRACTS:**

See **FRAUDS, STATUTE OF**.

**PAROL EVIDENCE:**

In civil actions, see **EVIDENCE**, 1.

**PARTICULARS:**

Bill of, see **PLEADING**, 2.

**PARTIES:**

Contempt proceedings, see **CONTEMPT**, 3.

Rights and liabilities as to costs, see **COSTS**.

Entitled to sue for causing death, see **DEATH**.

**PARTIES—CONTINUED.**

Persons concluded by judgment, see JUDGMENT, 11.

In relation of master and servant, see MASTER AND SERVANT, 1.

Entitled to reserve retained under contract for public work, see STATES, 1, 2.

In action to recover void tax, see TAXATION, 6.

Judgment against in action for picketing place of business, see TRADE UNIONS.

**PART PAYMENT:**

As accord and satisfaction, see ACCORD AND SATISFACTION.

**PATENTS:**

1. PATENTS—ASSIGNMENTS—EVIDENCE—SUFFICIENCY. Findings that an assignment of patent rights were to be unconditional are sustained where records of corporate minutes, made when there was no controversy, so indicated, the first suggestion for restriction was made by an attorney after the agreement, and the interested testimony of the assignor was contradicted by less interested testimony. *Laubach Union Check Valve Co. v. Laubach*..... 115

**PAYMENT:**

See ACCORD AND SATISFACTION.

Bill of exchange or promissory note, see BILLS AND NOTES.

Final payment under building contract, see CONTRACTS, 4, 5.

Of alimony, inability of husband, see DIVORCE, 10.

Claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 1.

Of compensation to executors, see EXECUTORS AND ADMINISTRATORS, 5.

Of city warrants, see MUNICIPAL CORPORATIONS, 15.

Of local improvement bonds, see MUNICIPAL CORPORATIONS, 16-18.

Recovery of tax paid, see TAXATION, 6, 7.

Tender of, see TENDER.

**PERFORMANCE:**

Of contract of employment, see ATTORNEY AND CLIENT, 2, 3.

Of contract for commissions by broker, see BROKERS, 1, 2, 5-7.

Of building contract, see CONTRACTS, 4, 5.

Enforcing performance of contract, see SPECIFIC PERFORMANCE.

**PERMITS:**

For shipping liquor into state, see COMMERCE, 1; INTOXICATING LIQUORS, 1-5.

To mutual insurance company to write other classes of insurance, see INSURANCE.

**PERSONAL INJURIES:**

See NEGLIGENCE.

Right of contractor to contribution for negligence of city, see CONTRIBUTION.

**PERSONAL INJURIES—CONTINUED.**

- Damages for, see DAMAGES, 1.
- To traveler on highway, see HIGHWAYS.
- To employee, see MASTER AND SERVANT, 1.
- To third person, see MASTER AND SERVANT, 2.
- To person on city street, see MUNICIPAL CORPORATIONS, 20-31.
- Claims against city for, see MUNICIPAL CORPORATIONS, 32-34.
- To person on or near railroad tracks, see RAILROADS, 1-4.
- Priority of claim for in receivership, see RECEIVERS, 6.

**PETITION:**

- For writ of review, see CERTIORARI.
- For vacation of default judgment, see JUDGMENT, 1.
- For recall of officers, see OFFICERS.
- Referendum petitions, filing of, see STATUTES, 1.

**PHYSICIANS AND SURGEONS:**

- Issuance of prescriptions for whiskey, see INTOXICATING LIQUORS, 12, 13.
- Privileged communications, see WITNESSES, 3.

1. PHYSICIANS AND SURGEONS—DENTISTS—DEFECTIVE WORK—LIABILITY. A dentist is liable for damages for pain and suffering caused a patient by defective and unsanitary sets of teeth which did not fulfill the representations and warranty made by him. *Mullins v. Alveolar Dental Co.*..... 170

**PICKETING:**

- See TRADE UNIONS.
- Damages for loss of profits, see DAMAGES, 2.
- Enjoining picketing by trade union, see INJUNCTION, 1.

**PLEADING:**

- Amendment on appeal, see APPEAL AND ERROR, 10.
- Harmless error in rulings on, see APPEAL AND ERROR, 19.
- On note, see BILLS AND NOTES.
- Amendment of complaint on appeal from justice court, see CRIMINAL LAW, 2, 3.
- In action for divorce, see DIVORCE, 4.
- In action for fraud inducing purchase of land, see FRAUD, 3-5.
- To support or enforce garnishment, see GARNISHMENT, 2.
- Indictment or criminal information or complaint, see INDICTMENT AND INFORMATION.
- In action to vacate judgment, see JUDGMENT, 3-5.
- Defense of surety in action on official bond, see PRINCIPAL AND SURETY, 2.
- Complaint for appointment of receiver, see RECEIVERS, 1.
- Upon hearing to fix priority of claims in receivership, see RECEIVERS, 5.
- Complaint in action to recover subscription, see SUBSCRIPTIONS, 1.

## PLEADING—CONTINUED.

1. PLEADING—COMPLAINT — DEFINITENESS. After issue joined, without moving for a more specific statement, objection to the sufficiency of a complaint on that ground cannot be made. *Nordlund v. Nordlund* ..... 475
2. PLEADING — BILL OF PARTICULARS—EXCUSE — ABILITY TO FURNISH. In an action for a physician's services, upon demand for a bill of particulars, an itemized statement of the value of the medicines furnished is not excused by an allegation in the amended complaint that the exact amount and fair value of medicines given at each visit could not be positively ascertained but aggregated in excess of \$500; and evidence thereof must be excluded, under Rem. Code, § 284, so providing in case of failure to furnish the bill of particulars. *Sanborn v. Dentler*..... 149
3. PLEADINGS—MOTIONS—JUDGMENT ON PLEADINGS. Where motions for judgment on the pleadings were made by both parties, they are bound by the record as it then was when the motions were heard. *Depauw University v. Ankeny*..... 451
4. PLEADING—ISSUES AND PROOF. Failure of proof as to some items of the complaint does not affect the right to a recovery for others. *Mullins v. Alveolar Dental Co.*..... 170

## POLICE POWER:

License tax on telephone and telegraph poles as exercise of police power, see LICENSES.

## POLLS:

Time for opening at election for issuance of bonds, see SCHOOLS AND SCHOOL DISTRICTS, 3.

## PORT DISTRICTS:

Power to operate railway, see MUNICIPAL CORPORATIONS, 1.

## POSSESSION:

Character of to establish title, see ADVERSE POSSESSION.

Redelivery bonds, see FORCIBLE ENTRY AND DETAINER.

Of mortgaged property on foreclosure, see MORTGAGES, 5.

## POWERS:

Of court to grant supersedeas, see APPEAL AND ERROR, 6.

Of court to grant new trial after remand on appeal, see APPEAL AND ERROR, 27.

Of attorney to bind city by stipulation, see ATTORNEY AND CLIENT, 1.

Of courts in contempt proceedings, see CONTEMPT, 2.

Of corporate officers, see CORPORATIONS, 4.

Of court to modify absolute divorce awarding alimony, see DIVORCE, 6, 9-11.

Of insurance commissioner, see INSURANCE.

Of attorney, as constituting equitable mortgage, see MORTGAGES, 1.



**POWERS—CONTINUED.**

Of port districts, see MUNICIPAL CORPORATIONS, 1.

Of attorney, see PRINCIPAL AND AGENT, 2.

Of district board to build schoolhouse, see SCHOOLS AND SCHOOL DISTRICTS, 2.

**PRACTICE:**

See APPEAL AND ERROR; CRIMINAL LAW; DIVORCE; INJUNCTION; JUDGMENT; MANDAMUS; PLEADING; TRIAL.

Prosecution of actions in general, see ACTION.

**PREFERENCES:**

Effect of proceedings in bankruptcy, see BANKRUPTCY.

**PREJUDICE:**

Ground for reversal in civil actions, see APPEAL AND ERROR, 18-23.

Ground for change of venue, see CRIMINAL LAW, 1.

Ground for reversal in criminal action, see CRIMINAL LAW, 17, 18.

**PRESCRIPTION:**

Acquisition of rights, see ADVERSE POSSESSION.

Unlawful issuance of for whiskey, see INTOXICATING LIQUORS, 12, 13.

**PRESENTMENT:**

Of claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 1.

Of claim against city, see MUNICIPAL CORPORATIONS, 32-34.

**PRESUMPTIONS:**

As to negligence, see NEGLIGENCE, 2.

**PRINCIPAL AND AGENT:**

See BROKERS.

Corporate officers, see CORPORATIONS, 4.

Delivery of deed to agent, see DEEDS, 2.

Representations of agent inducing purchase of land, evidence of, see FRAUD, 7-10.

Agency of husband in control of community personal property, see HUSBAND AND WIFE.

Shipment of liquor into state through instrumentality of agent, see INTOXICATING LIQUORS, 2.

Attorney in fact, see MORTGAGES, 1.

Secret purchase by agent, see TRUSTS.

1. PRINCIPAL AND AGENT—RELATION—TERMINATION—EVIDENCE—SUFFICIENCY—NOTICE OF CANCELLATION. The evidence sustains findings that an agency was mutually cancelled on February 13, and the matter kept secret to give the agent an opportunity to dispose of cars on hand, where a letter was written February 26, evidently referring to such previous arrangement and requesting return of the contract,

**PRINCIPAL AND AGENT—CONTINUED.**

which the agent acquiesced in; and in such case the agent cannot insist upon the ten days' notice of cancellation provided for in the contract of employment. *Wetherby v. Mark*..... 463

2. **PRINCIPAL AND AGENT—POWER OF ATTORNEY—RECITALS—ESTOPPEL.** A reference in a power of attorney to a supposed assignment, does not estop the principal from denying the existence of the assignment, where it was immaterial to the essential purpose of the power. *In re Springer's Estate*..... 546

**PRINCIPAL AND SURETY:**

Liability of surety on redelivery bond, see **FORCIBLE ENTRY AND DETAINER**, 1, 2.

Liability of surety on jitney bus bond, see **MUNICIPAL CORPORATIONS**, 19.

Surety on contractor's bond, see **STATES**.

1. **PRINCIPAL AND SURETY—OFFICIAL BOND—JUDGMENT AGAINST PRINCIPAL.** A judgment against a sheriff for a wrongful levy is not conclusive upon the sureties upon his official bond conditioned merely for the faithful discharge of the sheriff's duties, but is no more than *prima facie* of the merits in a subsequent case against the sureties, casting the burden of proof upon them. *Larson v. Deering*.... 616
2. **SAME—ACTIONS—OFFICIAL BONDS—DEFENSES OF SURETY.** In an action upon a sheriff's official bond to collect a judgment recovered against the sheriff for a wrongful levy, the sureties' answer setting up the lawfulness of the sheriff's acts states a good defense as to the sureties. *Larson v. Deering*..... 616

**PRIORITIES:**

Of garnishment, see **GARNISHMENT**, 2.

Of laborers' liens, see **LOGS AND LOGGING**, 1.

Of mortgages, see **MORTGAGES**, 2, 3.

Of claims in receivership, see **RECEIVERS**, 5, 6.

**PRIVILEGED COMMUNICATIONS:**

Disclosure by witness, see **WITNESSES**, 2, 3.

**PROCESS:**

1. **PROCESS—NONRESIDENTS—SUBSTITUTED SERVICE.** Where, upon dismissal of garnishment proceedings, there was no property within this state of nonresidents at the time of personal service on them outside of the state, such service was ineffectual for any purpose. *Morris & Co. v. Belken*..... 457

**PROFITS:**

Loss of profits from picketing, evidence of, see **DAMAGES**, 2.

**PROHIBITION:**

Of traffic in intoxicating liquors, see **INTOXICATING LIQUORS**.

1. **PROHIBITION—ADEQUATE REMEDY AT LAW—DENIAL OF CHANGE OF VENUE—JURISDICTION.** Rem. Code, §§ 207-209, providing for a change of venue of a transitory action to the county of defendant's residence grants a right independent of the merits, the assertion of which, under undisputed facts, ousts the court of jurisdiction to hear and determine the cause; and the remedy by appeal, where the court denies the application on admitted facts and insists upon proceeding with the cause, is not adequate within the meaning of Rem. Code, §§ 1027, 1028, authorizing prohibition where a tribunal is acting without or in excess of jurisdiction, and there is no plain, speedy and adequate remedy at law. *State ex rel. Martin v. Superior Court* ..... 358

**PROMISSORY NOTES:**

See **BILLS AND NOTES**.

**PROMOTERS:**

Fraud of in subscription contract, see **CORPORATIONS**, 1.

**PROPERTY:**

Adverse possession, see **ADVERSE POSSESSION**.  
 Subject to mortgage, see **CHATTEL MORTGAGES**, 1.  
 Damages for injuries to, see **DAMAGES**, 2.  
 Conveyed by deed, see **DEEDS**, 4.  
 Taking or damaging for public use, see **EMINENT DOMAIN**.  
 Subject to garnishment, see **GARNISHMENT**, 1.  
 Subject to assessment of benefits, see **MUNICIPAL CORPORATIONS**, 10.

**PROTEST:**

Collection of tax under protest, see **TAXATION**, 7.

**PROXIMATE CAUSE:**

Of accident in street, instructions, see **MUNICIPAL CORPORATIONS**, 28, 30.

**PUBLIC IMPROVEMENTS:**

By municipalities, see **MUNICIPAL CORPORATIONS**, 5-18.  
 Contracts for, see **STATES**.

**PUBLIC LANDS:**

Appropriation of waters on state lands, see **WATERS AND WATER COURSES**.

**PUBLIC POLICY:**

See **CONTRACTS**, 1.

**PUBLIC SCHOOLS:**

See **SCHOOLS AND SCHOOL DISTRICTS**.

**PUBLIC USE:**

Taking property for public use, see **EMINENT DOMAIN**.

**PUNISHMENT:**

For contempt, see **CONTEMPT**, 2.

For unlawfully keeping liquor for sale, see **INTOXICATING LIQUORS**, 14.

**QUALIFICATIONS:**

Of jurors, see **JURY**.

**QUESTION FOR COURT:**

See **TRIAL**, 5.

**QUESTION FOR JURY:**

In action for injury to person in city street, see **MUNICIPAL CORPORATIONS**, 25, 26.

Negligence of driver of automobile struck by train at crossing, see **RAILROADS**, 2.

Cause of fire on right of way, see **RAILROADS**, 5.

**RAILROADS:**

Carriage of goods and passengers, see **CARRIERS**.

Power of port district to operate, see **MUNICIPAL CORPORATIONS**, 1.

Receivers of, see **RECEIVERS**, 5, 6.

In city streets, see **STREET RAILROADS**.

1. **RAILROADS—CROSSING ACCIDENTS—NEGLIGENCE—EVIDENCE — SUFFICIENCY.** It is negligence to run an electric train through a deep cut onto a much used crossing, where the view from the road was obstructed, at 50 miles per hour, without any warning except a faint whistle the instant before reaching the crossing. *Hubenthal v. Spokane & Inland Empire R. Co.*..... 581
2. **SAME—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.** The contributory negligence of the driver of an automobile, struck by an electric train at a crossing, is for the jury, where the crossing was in a deep cut, he approached the tracks at about one mile per hour, looking all the time for an approaching train, but owing to obstruction of the view, it was impossible for him to see the train, approaching at high speed, until the front end of the automobile was about six inches from the rail, when an attempt to reverse and back up would have been more hazardous than to attempt to cross. *Hubenthal v. Spokane & Inland R. Co.*..... 581
3. **RAILROADS — CROSSING ACCIDENTS — NEGLIGENCE — LAST CLEAR CHANCE—EVIDENCE—SUFFICIENCY.** The doctrine of last clear chance applies where the engineer upon a train approaching a crossing, saw, at a distance of 700 or 800 feet, or in the exercise of reasonable care should have seen, the plaintiff's traction engine on the

**RAILROADS—CONTINUED.**

- crossing, stalled near the railroad tracks in a position of peril, but did nothing to attempt to stop the train until within 100 feet of the crossing, when it was too late to avoid a collision, and it appears that the train should have been stopped and was stopped within a distance of 500 or 600 feet. *Ricker v. Oregon-Washington Railroad & Navigation Co.*..... 183
4. **SAME—CROSSING ACCIDENT—LAST CLEAR CHANCE.** The doctrine of last clear chance has no application, where, if there was contributory negligence, it continued up to the instant of the collision; nor where there was no contributory negligence, as the rule presupposes the existence of contributory negligence. *Hubenthal v. Spokane & Inland R. Co.*..... 581
5. **RAILROADS—FIRES—NEGLIGENCE—QUESTION FOR JURY.** It cannot be held as a matter of law that oil burning locomotives cannot cause fires upon the right of way, and the question is for the jury, where two witnesses testified to fires escaping from oil burners. *Slaton v. Chicago, Milwaukee & St. Paul R. Co.*..... 441
6. **SAME—FIRES—NEGLIGENCE—EVIDENCE—ADMISSIBILITY.** In an action for a railroad fire, based upon the negligent keeping of the right of way, evidence of other fires along the right of way at other times is admissible as tending to show a knowledge of the condition and negligence. *Slaton v. Chicago, Milwaukee & St. Paul R. Co.* 441

**RAPE:**

1. **RAPE—EVIDENCE—COMPLAINT — ADMISSIBILITY.** In a prosecution for rape, while the fact of complaints made is admissible, it is error to allow the person to whom the complaints were made to give the details and particulars of the complaint as related to him, since the same would be hearsay. *State v. Aldrick*..... 593
2. **SAME—EVIDENCE — COMPLAINTS — RES GESTAE.** In a prosecution for rape, details and particulars of a complaint made, narrating the occurrences of the previous evening, are not admissible as part of the *res gestae*, as it was not the utterance of instinctive words. *State v. Aldrick*..... 593

**RATIFICATION:**

Of contract, see **SALES**, 3.

**REAL ESTATE AGENTS:**

See **BROKERS**.

**REASONABLE DOUBT:**

Instructions, see **CRIMINAL LAW**, 14.

**REBUTTAL:**

Evidence in criminal case, see **CRIMINAL LAW**, 4, 6.

Evidence in rebuttal, in prosecution for blackmail, see **THREATS**, 3.

**RECALL:**

Of officers, see **OFFICERS**.

**RECEIVERS:**

Review of questions as to priority of claims as dependent on presentation of facts in record, see **APPEAL AND ERROR**, 9.

Representations by corporate officer at receiver's sale, see **CORPORATIONS**, 4.

1. **RECEIVERS — APPOINTMENT — GROUNDS — COMPLAINT—SUFFICIENCY.** The court has no power to appoint a receiver of a corporation in an action at law upon an open account where the complaint does not indicate in any way that any kind of equitable relief is asked, there being no showing that would even bring the case within Rem. Code, § 741, subd. 6th, providing for the appointment of receivers in "such other cases as may be provided by law, or when, in the discretion of the court, it may be necessary to secure ample justice to the parties." *Grays Harbor Commercial Co. v. Fifer*..... 380
2. **RECEIVERS—APPOINTMENT—COLLATERAL ATTACK.** A sale by a statutory receiver, appointed by the court under Rem. Code, § 740, to manage and dispose of property during the pendency of an action or proceeding as an officer of the court, cannot be impeached by evidence that the corporation was not insolvent and that the receiver was only an agent appointed by consent to settle differences between the parties to the action. *Fryar v. Hazelwood Holstein Farms* ..... 78
3. **RECEIVERS—SALES—NOTICE—LIABILITY BY CORPORATION.** A receiver conducting a sale that had been previously advertised by the corporation is not required to give notice that it was a receiver's sale; and the corporation would not be liable for any fault or omission by the receiver. *Fryar v. Hazelwood Holstein Farms*..... 78
4. **RECEIVERS — SALES — MISREPRESENTATIONS — LIABILITY—REMEDIES.** Under the rule of *caveat emptor*, misrepresentations of fact by a receiver or his agent at a receiver's sale give no cause of action against the receiver as such, the remedy being against the receiver personally or by timely rescission. *Fryar v. Hazelwood Holstein Farms* ..... 78
5. **RECEIVERS — PRIORITY OF CLAIMS — DETERMINATION — PLEADINGS.** Upon a hearing to fix the priority of claims in a receivership, a written denial of a claim of priority is not necessary, inasmuch as priority will be determined irrespective of any claim made. *Crawford v. Seattle, Renton & Southern R. Co.*..... 651
6. **RECEIVERS—CLAIMS—PRIORITIES.** A claim for personal injuries sustained in the operation of a road prior to a receivership should not be given a preference over prior mortgages. *Crawford v. Seattle, Renton & Southern R. Co.*..... 651

**RECITALS:**

In power of attorney, as estopping principal, see **PRINCIPAL AND AGENT**, 1.

**RECORDS:**

See **CHATTEL MORTGAGES**, 2.

On appeal, see **APPEAL AND ERROR**, 7-10.

Of dissolution of corporation for failure to pay license fees, see **CORPORATIONS**, 7.

Of deed as notice of fraud of agent inducing sale of land, see **TRUSTS**, 3.

**RECRIMINATION:**

See **DIVORCE**, 5.

**REDEMPTION:**

From mortgage, see **MORTGAGES**, 5.

Title of purchaser to rents during period of redemption, see **MORTGAGES**, 6.

**REGULATION:**

Of interstate shipments of liquor, see **COMMERCE**, 1-4.

Of insurance companies, see **INSURANCE**.

Of public corporations, see **LICENSES**.

Of moving picture shows, see **THEATERS AND SHOWS**.

**RELEASE:**

See **ACCORD AND SATISFACTION**.

**RELIANCE:**

By purchaser on statements of vendor to induce purchase of land, see **FRAUD**, 2, 5.

On representations of seller, see **SALES**, 2.

**REMAND:**

Of cause on appeal or writ of error, see **APPEAL AND ERROR**, 26, 27.

**REMOVAL OF CAUSES:**

Change of venue or place of trial, see **VENUE**.

**RENT:**

Covenants as to rentals, in deed of leased premises, see **DEEDS**, 4.

Right of purchaser to rents under unexpired lease during period of redemption, see **MORTGAGES**, 6.

**REPEAL:**

Of by-law, see **CORPORATIONS**, 3.

**REPRESENTATION:**

Of city by officer, see **MUNICIPAL CORPORATIONS**, 18.

**REPUDIATION:**

Of constructive trust, see TRUSTS, 4.

**RESCISSION:**

Of contract of sale, see SALES, 2.

Of contract for sale of land, see VENDOR AND PURCHASER, 2-4.

**RESERVE:**

In contract for protection against lien claimants, see STATES, 1, 2

**RES GESTAE:**

In prosecution for rape, see RAPE, 2.

**RESIDENCE:**

Statement of place of in claim against city, see MUNICIPAL CORPORATIONS, 33.

**RES IPSA LOQUITUR:**

See NEGLIGENCE, 2.

**RES JUDICATA:**

See DIVORCE, 8, 9; JUDGMENT, 11.

**RETROSPECTIVE LAWS:**

See CONSTITUTIONAL LAW, 2.

**REVENUE:**

See TAXATION.

**REVIEW:**

See APPEAL AND ERROR; CERTIORARI.

In criminal prosecution, see CRIMINAL LAW, 1-3, 16-18.

Of decision of county board on appeal from orders of superintendent relating to boundaries of district, see SCHOOLS AND SCHOOL DISTRICTS, 1.

**REVOCATION:**

Subsequent will as revoking deed to be delivered after death, see DEEDS, 3.

**ROADS:**

Liability of township for defects in highway, see HIGHWAYS.

Streets in cities, see MUNICIPAL CORPORATIONS, 10, 19-31.

**SALARY:**

Acceptance of less sum as accord and satisfaction, see ACCORD AND SATISFACTION.

Agreement to accept less than fixed salary as violating public policy, see CONTRACTS, 1.



**SALARY—CONTINUED.**

- Recovery of interest on back salary retained from monthly payments, see **INTEREST**.
- Of city officer, see **MUNICIPAL CORPORATIONS**, 4.

**SALES:**

- By broker, see **BROKERS**.
- On mortgage foreclosure, see **CHATTEL MORTGAGES**, 3.
- Of intoxicating liquors, see **INTOXICATING LIQUORS**, 6, 7, 9.
- Keeping liquors intended for unlawful sale, see **INTOXICATING LIQUORS**, 8, 10, 11, 14.
- Of hened logs, see **LOGS AND LOGGING**, 2.
- On foreclosure of mortgage, see **MORTGAGES**, 5, 6.
- Receiver's sales, see **RECEIVERS**, 2-4.
- Of realty, see **VENDOR AND PURCHASER**.

1. **SALES—CONTRACT—OFFER AND ACCEPTANCE.** Under the rule that an unconditional order and unconditional acceptance must be found in a contract evidenced by correspondence, there was a sale of but one car load of hay, where plaintiff by letter ordered one car with "an option on 200 ton additional at same price after first car is unloaded," followed by a proposal to increase the order to 400 tons if the hay turns out satisfactorily, and asking the sellers when the first car would be shipped, and to confirm the 200 tons by return mail, to which the sellers replied giving the approximate date of first shipment, and stating that they would ship the 200 tons as fast as they could get it out, following which no shipment was made of the first car. *Jahn & Co. v. McClaine*..... 95
2. **SALES—RESCISSION—FRAUD.** Upon the sale of the furniture and good will of a hotel business, false representations as to the value of the business and the amount of monthly profits, peculiarly within the knowledge of the seller, and inducing the sale, may be relied upon by the purchaser, notwithstanding an inspection of the furniture which was also overvalued. *Sowles v. Fleetwood*..... 166
3. **SAME—FRAUD—RATIFICATION—REMEDIES OF VENDEE—LACHES.** The purchaser of the furniture and good will of a hotel business may retain the benefits of the contract and make defense to an action on the purchase money notes, commenced nine months later, without being guilty of laches precluding the defense of fraud in misrepresentations inducing the sale. *Sowles v. Fleetwood*..... 166
4. **SALES — WARRANTY — PROMISE.** A statement that a certificate would be furnished showing that an animal sold had been tuberculin tested is not a misrepresentation of a fact, but a promise, and does not amount to a breach of warranty. *Fryar v. Hazelwood Holstein Farms* ..... 78

**SATISFACTION:**

- See **ACCORD AND SATISFACTION**.

**SCHOOLS AND SCHOOL DISTRICTS:**

Parties in action to recover illegal school district tax, see **TAXATION**, 6.

1. **SCHOOLS AND SCHOOL DISTRICTS—BOUNDARIES—DECISION—REVIEW—ACTION TO SET ASIDE—STATUTES.** An action in equity to set aside an order of the board of county commissioners affirming a decision of the superintendent of schools refusing to transfer lands from one school district to another does not lie, and is insufficient as an application for a writ of certiorari to review the same, where it seeks a trial *de novo* and does not bring up the record; in view of Rem. Code, § 4706, providing for appeals from orders of county superintendents relating to boundaries or the adjustment of assets and liabilities to the board of county commissioners, and for appeals to the courts only in "matters involving the construction of contracts," and § 4711, which provides that, on appeals to the board of county commissioners, its decision "shall be final unless set aside by a court of competent jurisdiction in an action brought therein to review such order or decision," which refers to certiorari to review the order on the record, and not by trial *de novo*. *Tufts v. Riffe* 500
2. **SAME—DISTRICT BOARDS—POWER TO BUILD SCHOOLHOUSE.** Under Rem. Code, §§ 4493, 4538, providing that the board of directors of school districts of the third class shall build schoolhouses when directed by a vote of the district to do so, and § 4664, authorizing the calling of a special meeting of the voters to determine the question, the school directors have no authority to build a schoolhouse, where their only authority was a special election upon the question of bonds which was void for want of legal notice of the election. *Stimson Timber Co. v. Mason County*..... 205
3. **SCHOOLS AND SCHOOL DISTRICTS — BONDS — ELECTIONS — TIME OF OPENING POLLS.** A school district election for the issuance of bonds for the construction of a schoolhouse is void where, pursuant to notice, the polls were not opened until two o'clock, in view of Rem. Code, § 4658, which provides that, unless otherwise designated in the notice of election, the polls shall be open at one o'clock in the afternoon and close at eight o'clock, but that the board may, previous to giving notice, determine on an hour for closing not later than four o'clock; the requirement that the polls be open at one o'clock being mandatory. *Stimson Timber Co. v. Mason County* 205

**SERVICE:**

Of process, see **PROCESS**.

**SET-OFF AND COUNTERCLAIM:**

1. **SET-OFF AND COUNTERCLAIM — SUBJECT-MATTER — DAMAGES FOR FRAUD.** In an action for fraud in inducing a purchase of property, in which plaintiff was allowed recovery for expenses for permanent improvements made by him upon the land, which reverted

**SET-OFF AND COUNTERCLAIM—CONTINUED.**

to defendant, promissory notes indorsed by defendant, given for the performance of labor in the improvement of the property and to prevent liens attaching, are not proper subjects of counterclaim, where it was shown that they were not included in the improvements for which plaintiff was allowed damages. *Eyers v. Burbank Co.* . . . 220

**SETTLEMENT:**

See ACCORD AND SATISFACTION.

**SHERIFFS AND CONSTABLES:**

Sureties on sheriff's official bond, see PRINCIPAL AND SURETY.

**SHIPMENT:**

Illegal shipment of liquors, see INTOXICATING LIQUORS, 1-5.

**SIDEWALKS:**

Injuries from obstructions, see MUNICIPAL CORPORATIONS, 21, 27.

**SIGNATURES:**

Canvass of on referendum petitions, see STATUTES, 1.

**SPECIFIC PERFORMANCE:**

1. SPECIFIC PERFORMANCE—PLAINTIFF'S PERFORMANCE—DEFAULT. Specific performance of a contract to convey land cannot be enforced where the contract called for the payment of \$143.50 and interest to the state "on the contract" and the sum was due to the state and had not been paid; and it is immaterial whether the defendant was entitled to rescind, since plaintiff must recover on the strength of his own title, and cannot do so while in default. *Smith v. Barber* . . . . . 18

**STARE DECISIS:**

See APPEAL AND ERROR, 25.

**STATEMENT:**

Of case or facts for purpose of review, see APPEAL AND ERROR, 7-9.  
Of officer as binding city, see MUNICIPAL CORPORATIONS, 18.

**STATES:**

Regulation of shipments of intoxicating liquor, see COMMERCE, 3, 4.  
Republican form of government, see UNITED STATES.  
Water rights in state lands, see WATERS AND WATER COURSES.

1. STATES — CONTRACTS — CONTRACTOR'S BONDS — RESERVE PAID INTO COURT—PARTIES ENTITLED—APPEAL—HARMLESS ERROR. In a controversy between the surety on a contractor's statutory bond to the state and claimants for labor and materials, over the application of the twenty per cent reserve paid into court by the state, in which there are more than enough valid claims to use up all the money

## STATES—CONTINUED.

- in court, so that there was a deficit to be made up by the surety, it is immaterial to the surety that part of the money was awarded to a claimant who was merely entitled to a judgment, where the reserve was applied on valid claims and any injury would be to other claimants entitled to the reserve, who are not complaining. *Title Guaranty & Surety Co. v. Coffman, Dobson & Co.*..... 211
2. SAME—CONTRACTS—CONTRACTOR'S BOND—CLAIMS—RESERVE—ASSIGNMENT—RIGHTS OF CREDITORS AND SURETY. Where a contract for the construction of a state bridge provided for the retention of the 20 per cent reserve for 30 days as a protection against claimants entitled to a lien, the reserve is a trust fund for labor and material claims against the contractor's bond, and not subject to assignment as against the rights of the surety on the contractor's bond; and this is true although the claim of the contractor's assignee was composed of lienable items, where the assignee failed to perfect its claim against the bond by filing the notice required by the statute. *Title Guaranty & Surety Co. v. Coffman, Dobson & Co.*..... 211
3. STATES—CONTRACTS—CONTRACTOR'S BONDS—DEMANDS SECURED—ADVANCES LOANED. Moneys loaned to a state contractor for the purpose of, and actually used for, the payment of labor performed and materials furnished for the construction of a state bridge, for which the surety on the contractor's bond would have been liable, are debts and demands secured by the bond, for which notice of claim against the bond may be filed under Rem. & Bal. Code, § 1159. *Title Guaranty & Surety Co. v. Coffman, Dobson & Co.*..... 211
4. STATES—CONTRACTS—CONTRACTOR'S BONDS—NOTICE OF CLAIM—TIME FOR FILING. Under Rem. & Bal. Code, § 1161, requiring claims against a contractor's statutory bond to be filed within 30 days from the "completion of the contract and acceptance of the work," a claim against a bond for the construction of a state bridge may be filed within 30 days after formal acceptance of the bridge by the highway commissioner, although the work was actually completed and the engineer made the final estimate some months previously, where the engineer derived no authority from the contract or the highway commissioner to accept the construction. *Title Guaranty & Surety Co. v. Coffman, Dobson & Co.*..... 211
5. SAME—CONTRACTS—CONTRACTOR'S BOND—NOTICE OF CLAIM—SUFFICIENCY. The notice of a claim against a contractor's statutory bond securing claims for the construction of a state bridge substantially complies with the statute although it does not name the sureties, where the notice mentions the bond and states an intention to hold it liable, and there was no other bond given. *Title Guaranty & Surety Co. v. Coffman, Dobson & Co.*..... 211
6. SAME. A notice of claim against a contractor's statutory bond securing claims for the construction of a state bridge is not void

**STATES—CONTINUED.**

on account of including nonlienable items, where it contained several lienable items in excess of the claim which were not so commingled that they could not be distinguished from the nonlienable items. *Title Guaranty & Surety Co. v. Coffman, Dobson & Co.*... 211

**STATUTES:**

See **SCHOOLS AND SCHOOL DISTRICTS**, 1.

Filing and service of statement of facts, see **APPEAL AND ERROR**, 8.

Insolvency of bankrupt, see **BANKRUPTCY**.

Recovery of claim for overcharges by carrier, see **CARRIERS**.

Regulating shipments of liquor, see **COMMERCE**, 1-4.

Validity of retrospective or *ex post facto* laws, see **CONSTITUTIONAL LAW**, 2.

Laws impairing obligation of contracts, see **CONSTITUTIONAL LAW**, 2, 3.

Dissolution of corporation for failure to pay license fee, see **CORPORATIONS**, 5-8.

Giving right of action against jitney bond for wrongful death, see **DEATH**.

Compensation of executors, see **EXECUTORS AND ADMINISTRATORS**, 4.

Statute of frauds, see **FRAUDS, STATUTE OF**.

Management and control of community property, see **HUSBAND AND WIFE**, 2.

State-wide prohibition law, see **INTOXICATING LIQUORS**, 4, 5, 14.

Of limitation, see **LIMITATION OF ACTIONS**.

Rights of purchaser during period of redemption, see **MORTGAGES**, 6.

Creation of port districts and defining powers of, see **MUNICIPAL CORPORATIONS**, 1.

City ordinances, see **MUNICIPAL CORPORATIONS**, 2, 3.

Assessments for public improvements, see **MUNICIPAL CORPORATIONS**, 14.

Payment of local improvement bonds, see **MUNICIPAL CORPORATIONS**, 16.

Bonds for operation of jitney bus, see **MUNICIPAL CORPORATIONS**, 19.

Ordinance regulating moving picture shows, see **THEATERS AND SHOWS**.

1. **STATUTES—INITIATIVE AND REFERENDUM—FILING OF ADDITIONAL PETITIONS—CANVASS OF NAMES.** Notwithstanding that Const., art. 2, § 1, as amended, providing for the initiative and referendum, and the act passed to facilitate the same, Rem. Code, §§ 4971-11 to 4971-18, use the word "petition" in the singular number, in requiring a referendum petition, circulated among the voters, to be filed with the secretary of state, the law does not require that the petition must be physically one petition, as that would be impossible; and the filing of a petition consisting of a number of sheets or petitions by a proponent does not constitute such a final submission of a petition as to preclude the filing of additional petitions relating to the same

## STATUTES—CONTINUED.

- referendum, within the ninety days limited by the constitution; and on the filing of such additional petitions, the secretary of state must canvass the signatures upon the petitions theretofore filed, to determine whether the proposed referendum has the requisite number of signatures of legal voters; and it is immaterial that *Id.*, § 4971-12, authorizes the secretary of state to refuse to file a petition unless it appears to bear the requisite number of signatures, that § 4971-11, requires a statement of expenses with the filing of each petition, that § 4971-14 refers to the detaching of sheets for convenience in canvassing, and that by § 4971-13, the secretary of state may destroy petitions not containing the requisite number of signatures; as the act must be liberally construed to facilitate the language and spirit of the constitution. *State ex rel. Howell v. Superior Court*..... 569
2. STATUTES—EXECUTIVE CONSTRUCTION. Executive construction of an initiative measure, while not a controlling circumstance, is persuasive as to its proper meaning. *State v. Warburton*..... 242
3. STATUTES — TERRITORIAL LAWS — CONTINUATION BY CONSTITUTION. The territorial act, Rem. Code, § 951, making public corporations liable for torts, was continued in force by Const., art. 27, § 3, providing that all territorial laws not repugnant to the constitution shall remain in force until they expire by their own limitation or were altered or repealed by the legislature. *Orrock v. South Moran Township* ..... 144
4. SAME—CONSTRUCTION—EXTENSION BY INFERENCE. The territorial act, Rem. Code, § 951, making public corporations liable for torts, is extended by inference to include townships, subsequently recognized as public corporations; since townships are a species of the genus municipal corporations, recognized by the constitution and laws. *Orrock v. South Moran Township*..... 144

## STAY:

Pending appeal, see APPEAL AND ERROR, 6; FORCIBLE ENTRY AND DETAINER, 3.

## STIPULATIONS:

Power of attorney to bind city by in condemnation proceeding, see ATTORNEY AND CLIENT, 1.

To modify agreement or waiver in petition for improvement, see MUNICIPAL CORPORATIONS, 9.

## STOCK:

Corporate stock, see CORPORATIONS, 1, 2.

## STOCKHOLDERS:

Of corporations, see CORPORATIONS, 1, 2.

## STREAMS:

On state lands, see WATERS AND WATER COURSES.

**STREET RAILROADS:**

1. **STREET RAILWAYS—USE OF STREETS—FRANCHISE—RIGHT TO COMPENSATION—EVICTION.** Preventing a street railway company from using a street under its franchise during a period in which it was claimed by the city that the franchise had been forfeited, amounts to a partial eviction and suspends the right of the city to collect the two per cent per annum upon the company's gross receipts provided for in the franchise, during the period in question, where the company was thereby put to an expense in excess of the two per cent contracted for; and it is in such case immaterial that the company used other streets under the franchise during the period. *Crawford v. Seattle, Renton & Southern R. Co.*..... 70
2. **SAME—FRANCHISE—COMPENSATION — DEFENSES — TENDER.** Tender of two per cent of the gross receipts of a street railway, made to a city at a time when it was contending that the company's franchise was forfeited, in an effort to induce the city to comply with the franchise contract, is not a waiver of defenses or an admission that the city was entitled thereto, where it was not accepted by the city. *Crawford v. Seattle, Renton & Southern R. Co.*..... 70

**STREETS:**

See MUNICIPAL CORPORATIONS, 10, 19-31.

Use of under city franchise, see STREET RAILROADS.

**SUBSCRIPTIONS:**

To corporate stock, see CORPORATIONS, 1.

1. **SUBSCRIPTIONS — COMPLAINT — SUFFICIENCY.** A complaint upon a contract to subscribe an endowment fund in consideration of the attempt of the trustees of a university to add to the fund a specified sum, alleging that the trustees made the attempt and did all the things required of them by the contract, is sufficient to state a cause of action, in the absence of motion to make more definite and certain. *Depauw University v. Ankeny*..... 451
2. **SUBSCRIPTIONS—CONTRACT—CERTAINTY.** A subscription to an endowment fund is not void for uncertainty, in that it is stated to be in consideration of the "attempt" of the trustees to add \$500,000 to the endowment fund, which is capable of being interpreted as referring to the attempt then and thereafter to be made. *Depauw University v. Ankeny*..... 451
3. **SAME.** Such contract is not void for indefiniteness in failing to define the nature of the attempt. *Depauw University v. Ankeny* 451
4. **SAME—CONSIDERATION.** Efforts expended in procuring subscriptions to an endowment fund of a university constitute a sufficient consideration to support a promise to pay a subscription, if, in reliance thereon, an act has been done or money expended. *Depauw University v. Ankeny*..... 451

**SUBSCRIPTIONS—CONTINUED.**

5. **SAME.** Where a subscription to an endowment fund was, with others, exhibited to prospective subscribers, and subsequently \$27,000 was subscribed and paid to meet the expenses of the campaign, it sufficiently appears that the subscription was relied on and money expended after it was made. *DePauw University v. Ankeny*... 451

**SUPERSEDEAS:**

On appeal, see **APPEAL AND ERROR**, 6.

**SURETYSHIP:**

See **PRINCIPAL AND SURETY**.

**SURPRISE:**

Ground for continuance, see **CRIMINAL LAW**, 8.

**TAXATION:**

License tax on telephone poles as impairing obligation of franchise, see **CONSTITUTIONAL LAW**, 3.

License tax on telegraph and telephone poles as police regulation, see **LICENSES**.

1. **TAXATION—VALUATION FOR ASSESSMENT—EXCESSIVENESS—EVIDENCE—SUFFICIENCY.** An assessment of timber and timber lands for taxation will be set aside as arbitrary and discriminatory where the assessor adopted old valuations without revision in the face of a depreciation in the market value, and without applying the 50 per cent basis for assessment, and in applying the zone system without relation to the quality or accessibility of the timber on any given tract, which was prohibitive of the exercise of any personal judgment on the part of the taxing officers. *Weyerhaeuser Timber Co. v. Pierce County*..... 534
2. **SAME.** The valuation of all hemlock timber at the flat rate of 25 cents per thousand throughout the county will be set aside as excessive or arbitrary, where the evidence shows that hemlock had such value only where it is in sufficient quantity and accessible, and that much of it was of little commercial value, having only a speculative future, and that the assessor adopted without change the work of a prior assessor made at a time when the market was higher. *Weyerhaeuser Timber Co. v. Pierce County*..... 534
3. **SAME.** An assessment of timber and timber lands will not be set aside because the assessor in addition to the value of the timber included a "land value," where there was evidence that logged-off lands were of some value, and there was no separate assessment of the land, the statute, Rem. Code, §§ 9095, 9222-1, permitting the separate assessment of timber only in case of separate ownership; but the assessor having adopted a 60 per cent instead of a 50 per cent basis of valuation for assessment purposes, a reduction will



**TAXATION—CONTINUED.**

- be made accordingly to correspond with other classes of property.  
*Weyerhaeuser Timber Co. v. Pierce County*..... 534
4. **SAME—EXCESSIVE ASSESSMENT—EVIDENCE—ADMISSIBILITY.** In an action to reduce excessive assessments, evidence of assessments in prior years is admissible for the purpose of showing that the prior assessments were adopted and were made on a basis of 60 per cent when the law now in force requires a fifty per cent basis. *Weyerhaeuser Timber Co. v. Pierce County*..... 534
5. **TAXATION—ASSESSMENT—EXCESSIVENESS—EVIDENCE—SUFFICIENCY.** An assessment of coal lands for taxation will not be set aside as excessive where it was unquestionably supported by the testimony of two experts of undoubted learning and familiarity with the facts necessarily involved in their opinion, in view of the rule that the opinion of taxing officers in fixing land values will not be interfered with by the courts in the absence of arbitrariness or inequality, and the fact that the law presumes that the assessor fully performed his duty. *Northwestern Improvement Co. v. Pierce County* ..... 528
6. **TAXATION—RECOVERY OF VOID TAX—PARTIES—TRUSTEE—SCHOOL DISTRICTS.** A school district is not a necessary party defendant in an action to recover an illegal school district tax, where the collection was made by the county as trustee for the school district. *Stimson Timber Co. v. Mason County*..... 205
7. **SAME—VOID TAX—RECOVERY—PROTESTING LEVY.** Where a tax is void, it is not necessary to protest its levy, but the taxpayer may wait until the tax is collected under protest, and recover back the tax paid. *Stimson Timber Co. v. Mason County*..... 205

**TELEGRAPHS AND TELEPHONES:**

License tax on telephone poles as impairing obligation of franchise, see **CONSTITUTIONAL LAW**, 3.  
 License tax on poles in streets of city, see **LICENSES**.

**TENDER:**

By broker of contract price for land sold, see **BROKERS**, 5-7.  
 Of per centum of receipts to city as waiver of defense, see **STREET RAILROADS**, 2.

1. **TENDER—DEPOSIT IN COURT—EFFECT.** In an action for the services of a physician, the defendant, by deposit in court of a sum of money admitted to be due, admits that the plaintiff was a qualified and licensed practicing physician, and cannot urge failure of proof in that regard. *Sandborn v. Dentler*..... 149
2. **SAME.** A deposit in court, under Rem. Code, § 486, providing that, if plaintiff refuses to accept the sum in discharge of the action and shall not recover a larger amount, he shall pay all the costs

**TENDER—CONTINUED.**

that may accrue from the time of the deposit, is simply a provision for making tender after commencement of the action, and admits the amount due, with the same effect as a tender. *Sanborn v. Dentler* ..... 149

**TERMINATION:**

Of contract with broker, see **BROKERS**, 4.  
Of agency, see **PRINCIPAL AND AGENT**, 1.

**TERRITORIES:**

Continuation of territorial laws by constitution, see **STATUTES**, 3.

**THEATERS AND SHOWS:**

1. **THEATERS AND SHOWS—REGULATION—ORDINANCE—CONSTRUCTION—OFFENSES—OFFENSIVE PICTURES—APPROVAL.** In a prosecution for violating a city ordinance that positively prohibited the display of offensive picture films of a described sort, the approval of the advisory committee is no defense, where by the ordinance the committee was to assist in the enforcement of the ordinance, which provided that a film must be displayed to the committee upon demand and that no film shall be displayed after examination unless approved, there being no power to approve prohibited films. *Seattle v. Smythe* ..... 351
2. **SAME—REGULATION—OFFENSES—GOOD FAITH.** Good faith is no defense to a prosecution for the violation of an ordinance prohibiting the display of offensive pictures, as intent is conclusively presumed from the act. *Seattle v. Smythe*..... 351

**THREATS:**

1. **THREATS—INFORMATION—SUFFICIENCY.** Under Rem. Code, § 2613, an information for blackmail is sufficient, where it charges that the accused, with intent to extort and gain \$24,000 from one T., sought to compel him to execute a lease and other papers, under threats of accusing him of certain crimes and publishing the accusations. *State v. Richards*..... 587
2. **SAME—NATURE AND ELEMENTS—"INTENT."** Under Rem. Code, § 2613, making the accusation of crime and certain other acts blackmail, if done with intent to extort or gain money or property, it is no defense that the accused thought that he was justly entitled to what he demanded, "intent" meaning that the purpose of the act was to extort or gain. *State v. Richards*..... 587
3. **SAME—EVIDENCE—INTENT—COLLATERAL MATTERS—REBUTTAL.** In a prosecution for blackmail, the testimony of the accused, on cross-examination, that he had been advised by an attorney that his acts would not be blackmail, is not upon a collateral matter and may therefore be rebutted; since it would be material on the question of intent. *State v. Richards*..... 587

**TIMBER:**

Assessment for taxation, see **TAXATION**, 1-4.

**TIME:**

For filing statement of facts, see **APPEAL AND ERROR**, 8.

Alleging time of offense in information, see **INTOXICATING LIQUORS**, 8.

For opening polls at school election for issuance of bonds, see **SCHOOLS AND SCHOOL DISTRICTS**, 3.

For filing claim against contractor's bond, see **STATES**, 4.

**TITLE:**

Claim of title, see **ADVERSE POSSESSION**.

Of purchaser at foreclosure sale, see **CHATTEL MORTGAGES**, 3.

Estoppel to assert ownership of goods as against creditors, see **ESTOPPEL**, 1.

Of purchaser during period of redemption, see **MORTGAGES**, 6.

Municipal ordinances, see **MUNICIPAL CORPORATIONS**, 2.

**TORTS:**

See **FORCIBLE ENTRY AND DETAINER**; **FRAUD**; **NEGLIGENCE**.

Damages for, see **DAMAGES**.

Causing death, see **DEATH**.

Liability of community property for tort of husband, see **HUSBAND AND WIFE**.

Of employers, see **MASTER AND SERVANT**.

Of city, see **MUNICIPAL CORPORATIONS**, 20-31.

Liability of township for, see **STATUTES**, 4.

Fraud of vendor in sale of land, see **VENDOR AND PURCHASER**, 1, 3, 4.

**TOWNSHIPS:**

Liability for defect in highway, see **HIGHWAYS**.

Liability for torts, see **STATUTES**, 4.

**TRADE UNIONS:**

Enjoining picketing by labor unions, see **INJUNCTION**, 1.

1. **TRADE UNIONS — ACTIONS — PARTIES — JUDGMENT.** In an action against unions and their officers for "picketing" plaintiffs' place of business, in which the complaint alleges that the unions were voluntary organizations with a membership of over five hundred, and that it was impracticable to bring in all the members, judgment for plaintiffs should award injunction, damages, and costs against the unions as organizations as well as against all other persons acting by, through, or for them. *St. Germain v. Bakery & Confectionery Workers' Union No. 9 of Seattle*..... 282

**TRANSCRIPTS:**

- Of record for purpose of review, see **APPEAL AND ERROR**, 7-9.

**TRIAL:**

Exceptions or objections for purpose of review, see **APPEAL AND ERROR**, 3, 4.

Review of errors as dependent on presentation of same by record, see **APPEAL AND ERROR**, 7-9.

Review of verdicts, see **APPEAL AND ERROR**, 13.

Review of errors as dependent on prejudicial nature of same, see **APPEAL AND ERROR**, 18-23.

Instructions in action for breach of contract, see **CONTRACTS**, 6.

Instructions in action by contractor for contribution from city for damages paid to injured employee, see **CONTRIBUTION**.

Of criminal prosecution, see **CRIMINAL LAW**.

Instructions in action for injuries from defect in street, see **MUNICIPAL CORPORATIONS**, 28-31.

Place of trial, see **VENUE**.

Impeachment of witness, see **WITNESSES**, 4.

1. **TRIAL—COMMENT ON EVIDENCE.** It is not error, as comment on the evidence, for the court, in a colloquy with counsel, to correctly state what the evidence was upon a point in question. *State v. Sullivan* ..... 639
2. **TRIAL—INSTRUCTIONS—ASSUMPTION OF FACTS.** It is not error to refuse instructions assuming reckless conduct heedless of obvious dangers where there was nothing of that sort in the case as presented. *Walters v. Seattle*..... 657
3. **TRIAL—INSTRUCTIONS—SUBMISSION.** It cannot be presumed that the bracketing of parts of an instruction, taken to the jury room, unduly influenced the jury. *State v. Sullivan*..... 639
4. **TRIAL—CHALLENGE TO THE EVIDENCE—RIGHT TO DISMISSAL—MISTRIAL.** Upon sustaining a challenge to the sufficiency of the plaintiff's evidence as to one of the defendants, nothing remains to be done but to dismiss such defendant from the case, and a subsequent mistrial as to the remaining defendant does not affect the rights of such defendant to a dismissal. *State ex rel. Stone v. Superior Court* ..... 172
5. **TRIAL—CHALLENGE TO THE EVIDENCE—QUESTION FOR COURT.** A motion to discharge the jury and enter judgment for the defendant, upon challenging the sufficiency of plaintiff's evidence, presents an issue of law and not of fact, for the court. *State ex rel. Stone v. Superior Court* ..... 172
6. **TRIAL—VERDICT—CONSTRUCTION.** In an action for personal injuries, a verdict for the amount of medical and hospital expenses is not a finding of no negligence upon the part of the defendant, where under the instructions no recovery could be had in any amount without a finding of negligence. *Jorgenson v. Crane*..... 676
7. **TRIAL—FINDINGS OF FACT—NECESSITY.** In an action at law in which issues of fact are tried out on the merits before the court

**TRIAL—CONTINUED.**

without a jury, findings of fact are necessary to support the judgment; under Rem. Code, § 367, providing that, upon the trial of an issue of fact by the court, its decision shall be given in writing, with the facts found and the conclusions of law separately stated. *Boe v. Hodgson Graham Co.*..... 444

**TROVER AND CONVERSION:**

Conversion of funds of ward by guardian, see **GUARDIAN AND WARD.**

**TRUSTS:**

Estoppel of executors to claim compensation as trustees, see **EXECUTORS AND ADMINISTRATORS**, 6.

Effect of trust on limitation, see **LIMITATION OF ACTIONS**, 1.

1. **TRUSTS—CONSTRUCTIVE TRUST—PRINCIPAL AND AGENT—SECRET PURCHASE BY AGENT.** Although an agent was employed primarily to care for and rent property, a constructive trust arises in favor of the principal who, on the advice of her agent, sold property to a third person secretly acting for the agent, where it appears that the principal, a nonresident owner unacquainted with the property, relied upon the advice of the agent after he had invited and obtained her trust and confidence. *Ackerson v. Elliott*..... 31
2. **TRUSTS—CONSTRUCTIVE TRUST—NOTICE OF FRAUD—LACHES.** A principal is not guilty of laches in failing to discover that her agent had secretly obtained title to land which he had advised her to sell, from the fact that her attorney learned of the fact three years later, where the agent was under obligation to inform her that he acquired the land for himself. *Ackerson v. Elliott*..... 31
3. **SAME.** Since the recording of an instrument is notice only to subsequent purchasers, the recording of a deed to an agent, holding under a constructive trust for his principal, is not constructive notice of the fraud whereby the agent induced the principal to sell the land to a third person for his secret benefit. *Ackerson v. Elliott* 31
4. **SAME—CONSTRUCTIVE TRUST—REPUDIATION.** Adverse and open possession by an agent, who fraudulently obtained title to the land of his principal, is not a repudiation of the constructive trust, where the principal had no knowledge of the fraud or existence of the trust. *Ackerson v. Elliott*..... 31

**UNITED STATES:**

1. **UNITED STATES—REPUBLICAN FORM OF GOVERNMENT.** The admission by Congress of Senators and Representatives from this state since the adoption of the seventh amendment to the state constitution, conclusively recognizes the republican character of our state government under the amendment. *State v. Owen*..... 466

**UNLAWFUL DETAINER:**

See **FORCIBLE ENTRY AND DETAINER.**

**VACATION:**

See JUDGMENT, 1-10.

Decree of divorce, see DIVORCE, 6, 7.

Of judgment awarding damages, see EMINENT DOMAIN.

**VALUE:**

Of estate for computing compensation of executors, see EXECUTORS AND ADMINISTRATORS, 2, 3.

Valuation of property for taxation, see TAXATION, 1-5.

**VENDOR AND PURCHASER:**

Purchasers at foreclosure sale, see CHATTEL MORTGAGES, 2.

Election of remedies in action on note for purchase price of land, see ELECTION OF REMEDIES, 1.

Fraud inducing purchase of land, see FRAUD, 2-11.

Purchasers of mortgaged property, see MORTGAGES, 4.

Transfer of ownership of personal property, see SALES.

Counterclaim in action for fraud inducing purchase of property, see SET-OFF AND COUNTERCLAIM.

Specific performance of contract, see SPECIFIC PERFORMANCE.

Secret purchase of property by agent, see TRUSTS.

1. VENDOR AND PURCHASER—FRAUD—INSPECTION — EVIDENCE — SUFFICIENCY. Relief for false representations by a vendor in the sale of land is not warranted by the evidence, where it appears that misrepresentations as to a boundary were eliminated by the acceptance of a deed correcting it, that the vendee inspected the premises and was aware of the rocky and gravelly character of the soil which had been misrepresented, and any statement as to the amount of the cleared land could have been no more than an estimate, and the vendee had full opportunity to estimate it before buying. *Forrester v. Jastad*..... 633
2. VENDOR AND PURCHASER—RESCISSION BY VENDEE—GROUNDS. Under a contract for the sale of land requiring the vendor to set out and care for an orchard for one year, failure to properly care for the trees is not ground for rescission of the sale, the remedy being an action for damages. *Mezger v. Hazelwood Irrigated Farms Co.* 43
3. VENDOR AND PURCHASER—RESCISSION BY VENDEE—MISREPRESENTATIONS. Falsely representing that there was no snapdragon on a farm is ground for rescission, where it appears that it is a noxious weed practically impossible to eradicate and that there were several large patches of it, materially reducing the value of the farm. *Griffith v. Gifford*..... 22
4. SAME—MISREPRESENTATIONS — EVIDENCE — SUFFICIENCY. The evidence sufficiently establishes false representations by the vendor that there was no snapdragon on a farm, where it appears that he knew the weed, shocked oats over the patches of snapdragon on the

**VENDOR AND PURCHASER—CONTINUED.**

farm, and stated that there was none to his knowledge, and the vendees testified that they made inquiry of the vendor, who represented there was none on the place. *Griffith v. Gifford*..... 22

**VENUE:**

Criminal prosecutions, see CRIMINAL LAW, 1.

Of prosecution for illegal shipment of liquor into state, see INTOXICATING LIQUORS, 3.

Denial of change by court, see PROHIBITION.

1. **VENUE—CHANGE—TRANSITORY ACTIONS.** An action to cancel a mortgage given without consideration is a transitory one, and defendants, resident in L. county, are entitled to a change of venue, although the mortgaged lands were located in G. county where the action was brought. *State ex rel. Martin v. Superior Court*.... 358

**VERDICT:**

Review on appeal, see APPEAL AND ERROR, 13; CRIMINAL LAW, 16.

**VIEW BY COURT:**

Harmless error in, see APPEAL AND ERROR, 20.

**WAIVER:**

See ESTOPPEL.

Error waived in appellate court, see APPEAL AND ERROR, 12.

Of objection to evidence, see DEPOSITIONS.

Of liens, see LOGS AND LOGGING, 2.

Of demurrage for delay of contractor on public work, see MUNICIPAL CORPORATIONS, 7.

Of right to new trial, see NEW TRIAL.

**WARDS:**

See GUARDIAN AND WARD.

**WARRANT OF ATTORNEY:**

Judgments upon confession under warrant of attorney, see JUDGMENT, 9, 10.

**WARRANTS:**

Effect of vacation of judgment for damages on assignee of warrant issued in satisfaction of judgment, see EMINENT DOMAIN, 3.

Judgment on warrant of attorney, see JUDGMENT, 9, 10.

Failure of city to provide local assessment fund to pay warrant, see MUNICIPAL CORPORATIONS, 15.

**WARRANTY:**

On sale of goods, see SALES, 4.

**WATERS AND WATER COURSES:**

1. **WATERS AND WATER COURSES — APPROPRIATION — NONNAVIGABLE STREAMS—STATE LANDS.** Waters of a nonnavigable stream upon state lands granted for a scientific school cannot be appropriated by a nonriparian owner; since they are considered as part of the soil and as an incident to the owner's estate, and since, by Const., art. 16, §§ 1 and 2, public lands granted to the state for educational purposes are held in trust for all the people and can be disposed of only by sale at public auction to the highest bidder. *Colburn v. Winchell* ..... 27

**WILLS:**

Deed as testamentary devise, see **DEEDS**, 2, 3.

**WITHDRAWAL:**

Of names of electors from recall petition, see **OFFICERS**.

**WITNESSES:**

Harmless error in refusing to allow cross-examination, see **APPEAL AND ERROR**, 23.

Mileage and fees as costs, see **COSTS**.

Indorsement of new names on information, see **CRIMINAL LAW**, 8.

Credibility of employed witnesses, instructions, see **CRIMINAL LAW**, 13.

Experts, see **EVIDENCE**, 2.

1. **WITNESSES—TRANSACTIONS WITH PERSONS SINCE DECEASED OR INCOMPETENT.** In an action for a physician's services, original entries in the plaintiff's properly identified account book, containing memoranda as to diseases and conditions as they developed during the treatment, are not inadmissible as evidence of a party in interest as to a transaction had by him when suing a deceased or incompetent person, excluded by Rem. Code, § 1211. *Sanborn v. Dentler* ..... 149
2. **WITNESSES—PRIVILEGE—ATTORNEY AND CLIENT.** The rule of privilege respecting communications with an attorney does not extend to advice given by the attorney in contemplation of the future commission of blackmail, in which or in the avoidance of which, the client sought advice. *State v. Richards*..... 587
3. **WITNESSES — PRIVILEGED COMMUNICATIONS — PHYSICIANS.** Under Rem. Code, § 1214, providing that no physician shall be examined as a witness without the consent of his patient, error cannot be predicated upon refusing to require a physician to answer, where the physician claimed the privilege, and counsel stated he would not object in case the physician did not claim the privilege, since no consent was given. *Blackwell v. Seattle*..... 679
4. **WITNESSES — IMPEACHING OWN WITNESS — PRIOR STATEMENTS.** Where a witness for the plaintiff gave testimony favorable to the



**WITNESSES—CONTINUED.**

defendant upon a material point in contradiction of a previous signed statement favorable to the plaintiff, the plaintiff may introduce the prior statement for the purpose of affecting the credibility of the witness. *Blystone v. Walla Walla Valley R. Co.*..... 46

**WOODS AND FORESTS:**

Assessment of timber and timber lands, see **TAXATION**, 1-4.

**WRITINGS:**

Parol evidence to vary writings, see **EVIDENCE**, 1.

**WRIT OF ASSISTANCE:**

To obtain possession on foreclosure, see **MORTGAGES**, 5.

**WRIT OF ERROR:**

To United States supreme court, when operating as supersedeas, see **APPEAL AND ERROR**, 6.

**WRITS:**

See **CERTIORARI**; **GARNISHMENT**; **INJUNCTION**; **MANDAMUS**; **PROCESS**; **PROHIBITION**.

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